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Supreme Court of the United States

October Term, 1938

No. 651

FRANK HAGUE, individually and as Mayor of Jersey City, *et al.*,

Petitioners,

against

COMMITTEE FOR INDUSTRIAL ORGANIZATION, AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF

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Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF

Statement

The case is here upon writ of certiorari (respondents having joined in the prayer for the writ) to review the decree of the Third Circuit Court of Appeals entered on January 26, 1939 (4 R. 164*), affirming, with a modification in respondents' favor, the decree of the District Court for the District of New Jersey entered on November 7, 1938 (4 R. 136), which awarded comprehensive injunctive relief to the respondents, plaintiffs below, against petitioners, defendants below.

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*The record pages are consecutively numbered through the first three volumes of the transcript and will be referred to as "R." Pages of the fourth volume will be referred to as "4 R.".

Opinions

The opinion of the District Court (CLARK, *D. J.*) is reported in 25 F. Supp. 127 (R. 72). The opinion of the majority of the Circuit Court of Appeals (BIGGS and MARIS, *C. JJ.*) is unreported; it appears at 4 R. 101. The opinion of DAVIS, *C. J.*, dissenting on the issue of public meetings, but concurring in other conclusions of the majority, appears at 4 R. 141.

Summary of the Matters Involved

A concise and accurate summary of the matters involved is contained in the majority opinion of the Circuit Court of Appeals, to which the Court is respectfully referred.

The facts will be described at greater length in the body of this brief.

Facts Conclusively Determined Against Petitioners

It is emphasized at this point, in order to focus attention upon the true issue at bar, that all matters of fact, including the matter of discrimination in the enforcement of the public meeting ordinance, have been twice determined against the petitioners by the courts below. The District Court, noting that petitioners rested at the close of respondents' case without introducing any affirmative evidence in their own behalf, stated in its opinion that there was no substantial conflict in the testimony (R. 74-5) and made detailed findings (4 R. 128). The Circuit Court of Appeals confirmed the findings in all respects (4 R. 108, 109, 110, 111, 119). Under the familiar "two court" rule, these concurrent findings will be accepted as true by this Court unless "clear error" is shown. *Radio Corp. of America* v. *Radio Engineering Lab., Inc.*, 293 U. S. 1, 6

(1934); *United States* v. *O'Donnell*, 303 U. S. 501, 508 (1938); *United States* v. *Commercial Credit Co.*, 286 U. S. 63, 67 (1932). No error is or can be shown by petitioners. Accordingly, the only issue at bar is whether the facts, as concurrently found, support the decree in law.

Petitioners in their "Statement of the Case" wholly ignore the findings and present an apocryphal résumé of the facts which is misleading in many particulars and departs from the record.

Outline of Argument

Respondents agree with the lines of reasoning adopted by the majority below. Resting upon that opinion as the distilled statement of their case, respondents shall, preliminarily, show from the record the nature of the conflict in Jersey City, stressing the mood and direction of official behavior resulting in the deprivations of which respondents complain in this action. They shall then develop the specific acts of suppression enjoined by the decree under review, showing in each case the basis in law for the pertinent injunctive provisions (Part One). The balance of the brief will be devoted to refuting the petitioners' contentions as to jurisdiction (Part Two).

Nature of Official Suppression in Jersey City

Jersey City is an industrial center from which the sweatshop has not yet been banished (R. 858-71, 1295-1305).

The doctrine taught by labor organizations is that such conditions can be removed and the general standards of employment raised by the confederation of working men and women for the purpose of collective bargaining and other mutual aid and protection. This doctrine the respondent labor organizations and individual labor organizers, pursuing their normal objectives (see Finding B-1)

and regular callings (A-1), undertook to spread in the Jersey City area. Exhibit P-1 (one of the handbills confiscated by petitioners) is an example of respondents' preachment.

The propagation of any idea is a traffic necessarily involving the exercise of certain elementary human rights. Respondents acted in the belief that they had those rights in Jersey City as elsewhere in the United States—among others, the right to enter the town, walk about on the streets and converse with persons willing to be spoken to; the right to be free of groundless molestation by the police; the right to be secure in their persons and personal belongings against unreasonable search and seizure; the right to carry their message to the public by means of the written word, through circulars and placards; the right to assemble for discussion and debate in the public places of the City, there to petition, if need be, for redress of grievances. In sum, respondents thought they could exercise in Jersey City the minimal civil rights secured against invasion by the State and Federal Constitutions and laws of the United States.

They were mistaken. Although Mayor Hague himself concedes that within the period covered by this case respondent C. I. O. and its affiliated unions have used no "rough ways" of organizing (R. 1183)—a concession fortified by concurrent findings absolving respondents of any unlawful purpose or illegal behavior (Findings B-4, B-5)—the record is overwhelming that petitioners, the principal officials of Jersey City, effectively deprived respondents of the whole category of civil liberties and succeeded in enforcing a cloture upon them which in scope and intensity is perhaps unparalleled in the modern history of official suppression in this country. The effect was as intended; the official policy frustrated respondents' organizational work (see, *e. g.*, R. 961).

Respondent American Civil Liberties Union, deeming the policies of the City authorities a threat to democratic

processes, and pursuing its stated purpose of defending against abridgment of civil rights (B-2), soon came to the aid of the other respondents, among other ways by attempting to hold private and public meetings in Jersey City at which the controversy could be discussed. The City authorities thereupon suppressed A. C. L. U. as they had suppressed the other respondents. And during the period under review they have similarly suppressed, by every means at their command, any and all organizations, however diverse in character—ranging from the Catholic Workers to the American Whig-Chiosophic Society of Princeton University—which seemed to them to be connected in sympathy or motive with either C. I. O. or A. C. L. U. The suppression has continued without material abatement and will go on unless stopped by mandate of this Court.

Particular acts of suppression will be classified in the course of this brief for convenience of analysis; it is, however, important to remember that, as concurrently found by the courts below, all these acts were integral to a *"deliberate policy"* (Findings C-1, D-1, circulars, D-1, placards, E-1; R. 75; 4 R. 107) and were activated by a single motive. The case is tied together and should be viewed as a whole. In considering, for instance, whether petitioners exercised an honest and reasonable judgment in denying respondents the right to hold public meetings under the pertinent ordinance, it may be wise to recall that the petitioners had previously caused these respondents to be "deported", manhandled and abused and had discriminated against them in the enforcement of other ordinances. That these latter deprivations were without shadow of authority in law or justification in fact is now conceded by the petitioners—and was likewise conceded by Judge Davis. This Court may well judge whether a

group of officials who singled out respondents for unlawful suppression in these ways would stop short of suppressing them unlawfully in respect of public meetings. Petitioners' admission in this Court of the substantive illegality of their acts in all respects except that relating to public meetings carries its own invidious implication; they hope by that means to exclude from consideration the background of suppression against which the issue of public meetings assumes true color and perspective. Petitioners' effort should not succeed.

These circumstances, namely, that the blockade on civil liberties in Jersey City is pervasive and thorough, and that it results from a unified and deliberate policy, for the most part not only openly avowed but brazenly flaunted, are the notable features of the case and the measure of its peculiar significance in the American scene.

Prior cases in this Court have indicated sporadic violation of some of the civil rights in different sections of the country (e. g., *Lovell* v. *City of Griffin*, 303 U. S. 444 [1938]; *De Jonge* v. *Oregon*, 299 U. S. 353 [1937]). No prior case has presented, as does this case, the obliteration of virtually all the major civil rights of whole groups of people in a single community.

In prior cases the motive force behind the suppression may have been obscure. In this case the force is shown of record with great clarity and abundance of circumstantial detail.

That force is the officialdom of Jersey City, which has for many years held absolute power—power that derives not only from the authority of elective and appointive office, but from many extra-legal sources. The power is paternalistic and lays claim to a certain arrogant omniscience: it decides whether a given idea is or is not the kind of idea that ought to be disseminated in Jersey City;

if the answer is no, it proceeds with efficiency and despatch to prevent its dissemination.* And to this end it rallies an oversize police force, an efficient political machine, and a host of subservient organizations that must do its bidding or suffer the consequences of official wrath. The power has devious ways of causing its own evocation: thus it foments and inspires a "protest" from the "public" against the respondents or any other group fixed upon in advance as "undesirable"; it then proceeds, ostensibly on the basis of the "protest," to eliminate the "undesirable." The parallel between this process and those current in the despotisms abroad is too plain to be labored.

Frank Hague is the symbol of official power in Jersey City and deserves study as such.

"The evidence is uncontrovertible," said the Circuit Court of Appeals, "that he [Hague] was the spearhead of the movement to keep the [respondent] labor groups out of Jersey City" (4 R. 105).

Hague has been Mayor of Jersey City for twenty-four years (R. 1030). As Mayor he has general supervisory power over all City departments (R. 1031), and "by his admission and in fact the policies of these departments, including the policies of the department of public safety, are his policies" (Finding A-3; R. 1031-2).

He is moreover the active head of the dominant political party in Hudson County (R. 1031), and can testify proudly that he "raised" every one of the leaders of his twelve ward clubs in Jersey City (R. 1066)—all on the public payroll excepting one, who turns out to be a contractor. "I suppose he finds it more profitable without a position" (R. 1065). "We take good care of them" (*id.*).

The boss is sensible of his extra-legal power and not averse to making use of it. The record shows—to take

* See Judge CLARK's opinion on this point at R. 75-6.

one suggestive instance—that respondents were unable to hire a single suitable private hall in Jersey City after November, 1937, although the most comprehensive explorations were made (R. 324-9, 342-3, 429-35, 246-57, 484-8, 912-6, 930-1, 954). Hague admitted and explained the embargo. "I do not approve of un-American groups coming into Jersey City. That is clearly demonstrated by my attitude" (R. 1075). Knowing that, said Hague, a hall owner would feel that he was not "working within the proper scope" if he rented his hall to the respondents; and, if he did not work within the "proper scope," he might be embarrassed in the "little minor affairs" that concerned him at the City Hall (R. 1076-7)—in plain English, he would be beleaguered with denial of liquor licenses, building law violations, and the like. And so, "If they find I am in a controversy," hall owners deny halls "just automatically"; they "would not endeavor to offend the officials of Jersey City, knowing that" (R. 1081). Reminded of a prior case where a proprietor rashly sought to rent to an "undesirable" organization, and succeeded only in having his building declared unsafe, the Mayor cheerfully admitted, "'any port in a storm,' Counselor" (R. 1129).

The sum of Hague's influence was expressed by him in the phrase "I am the law." When questioned about that pronouncement, he agreed that "in the daily functioning of the government of Jersey City" it "is to all practical intents and purposes true" (R. 1250), and clung to substantially that view despite objections of his own counsel, protesting only against the phrase—the "idea of you injecting 'I am the law'" (R. 1251).

There is no doubt, then, that Hague is a formidable enemy. Having decided that respondents were "undesirable", "un-American" and "Red", he used against them all the weapons in his considerable armory. His function

all along, he said, was to "engineer" and "advise" as occasion might warrant (R. 1074). He was working "day and night" (*id.*). Here is a sketch of his activities in Hague's own words (R. 1074, 1075):

> "A. There was nothing on my part other than to engineer or try to advise whenever the occasion would warrant it; the police was handling the law and order side of the question and the people was resenting the invasion and the conduct of these people and naturally my instructions to the various groups, that is, the officials, was that they perform their duty as best they could."
>
> • • • • • • •
>
> "Q. Yes, I would like to get a general picture of what you have done. A. My public address at this large drive was one individual act; my conferences with the various heads of the various departments that has supervision over these disorderly conditions that may arise is two, and my complimentary remarks to the Chamber of Commerce and to all the other civil bodies is three, and I think that is sufficient."

This résumé is modest indeed.

We pass the police ministrations on "the law and order side of the question"—characterized by the court below as "in gross violation of the civil rights of the persons concerned" (4 R. 104), and glance briefly at why "the people was resenting the invasion and the conduct of these people."

C. I. O. applies by letter dated December 23 for a permit to hold a meeting on December 29 or 30 (R. 33-34).* The Director of Public Safety usually acts on such ap-

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*A. C. L. U. had previously applied for a permit by letter dated December 17 (R. 27 ff.). Petitioner Casey temporized with this application until after the last date specified therein for the meeting, asking impertinent and irrelevant questions (*id.*, R. 641-6, 650-3). Meanwhile "protests" were being fomented as described in the text.

plications within three days (R. 1058-9).* In this instance, however, he does not respond until December 27, and then says merely that he will make "prompt investigation" (R. 35). The reason for the delay is by no means recondite.

December 26, Hague addresses the people concerning the national advertising campaign launched by the City to attract industry, and comments in relatively restrained tones concerning C. I. O. (Exh. P-42):

> "* * * Their [C. I. O.] battle cry is to crush Hague because he has the courage to prevent them from gaining a foothold in Jersey City. That is the real purpose behind the C. I. O. movement in Jersey City. * * *
>
> "If the people of my city believe in me, as I know they do, all I ask is that the people of Jersey City aid me in my efforts to obstruct this lawless element, whose only objective is to crush by terrorism; whose motive is to force itself upon our city for the purpose of destroying life and property by violence. * * *"

December 28, while Casey is presumably investigating, an "Important Notice," subscribed "Message from Mayor's Office," is circulated among veterans, calling for attendance at a meeting that night (Exh. P-33). Hague says the message "came from the veterans" but could reasonably have been assumed to be what it claimed to be "because of my activities in this movement"; "we approved of everything now; we are not shirking any of that" (R. 1063). The meeting is held and results in a resolution of "protest",† the resolution is annexed to Casey's letter of December 30 denying the C. I. O. application and is stated to be a reason for the denial (R.

* The ordinance provides that application for a permit must be lodged at least three days in advance of the proposed meeting.

† Most of the signers of the "protest" are political associates of Hague or on the payroll (R. 1232-3). Hugh A. Kelly, chairman of the meeting, is secretary to Governor Moore (R. 1066).

38-44).* Respondents' counsel correctly summarized the situation when he wrote Casey on January 3 (R. 45):

> "Your letter * * * is very illuminating as to the nature of the investigation undertaken by you. Such an investigation concededly takes time. *Even a perfectly functioning organization requires at least one day to foment a mass-meeting.* * * *" (†)

January 6, a monster mass meeting is held in the City armory. The Jersey Journal of the same date publishes a full page "Proclamation" sub-titled "Mayor Hague's Appeal to the People," signed by the Mayor and attested by the City Clerk, reading in part as follows (Exh. P-44):

> "This meeting called by the Jersey City Chamber of Commerce and allied civic organizations will show to the nation that the people of the city are behind me solidly in my efforts to keep the red army of the invaders, hiding behind the mask of the C. I. O., out of Jersey City. Your continued presence until the conclusion of this rally is necessary to serve notice upon the whole country that I have the support of all of the people of Jersey City in my efforts to keep our city free from this menace.
>
> *"Be present and please do not leave until the end of the meeting at ten-thirty o'clock"* (Emphasis in original).

Printed post cards are sent out by the leaders of ward clubs soliciting attendance and promising free transportation to and from the meeting (Exh. P-34).§ The Mayor admits he edited or corrected the cards (R. 1070, 1075). The principal attraction of the meeting is Hague himself who, in the concluding speech, thanks the populace for "this ex-

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* The letter itself indicates that action was withheld to await the meeting.

† Italics in quotations ours unless otherwise indicated.

§ Exh. P-34, post card sent by Seventh Ward Club, is signed by Eugene Ertle. Ertle is City Clerk and attested the "Proclamation", P-44.

pression of their loyalty and support in my efforts to protect our city from invasion by the Communists and other Red groups behind the mask of a labor organization" (Exh. P-45). Director Casey was present at the meeting (R. 656).

January 12, the Mayor addresses a Chamber of Commerce dinner, unqualifiedly admitting concert among the petitioners in deliberately suppressing the respondents, and continuing the verbal onslaught (Exh. P-43):

> "* * * It was my duty, as I saw it, to notify the Commissioner of Public Safety that this invasion must not take place. We met them when they entered Jersey City and escorted them to the city lines. * * *
>
> "I want to tell you that as long as I am Mayor of this city, I will exert every ounce of law that is invested in me to drive this radical element out of our city. * * *
>
> "Gentlemen, * * * we stopped them. Not only did we stop them, but we locked them up. * * *
>
> "* * * So long as I am Mayor of Jersey City the great industries which provide livelihoods for our citizens will not be invaded and destroyed.
>
> "* * * As soon as they begin to shout about 'free speech,' and 'free press' and 'civil rights' and 'constitutional rights,' I know they are Communists, * * *"

As lately as June 3, while this very case is at trial, Hague again publishes an "Appeal to the People," urging cooperation in a "patriotic parade" (Exh. P-46):

> "Those of our people who cannot parade are invited to come and stand on the sidelines with an American Flag which will be supplied by the Committee of Veterans. This issue will determine whether Communism or Americanism will prevail in Jersey City. Your presence will be notice to the whole country that Jersey City is one of the greatest American cities in the Nation."

Of these appeals, manifestly calculated to arouse prejudice, Hague says (R. 1073):

> "A. Well, of course, in a movement of this character, particularly of such great importance that one who is the official head his principal desire is to have cooperation of the whole community, the people in general on every occasion that I have ever called upon the people of our city they have responded, and I was then thanking them for their presence, in the call to the people of Jersey City to present themselves and by their presence file a protest and to stamp their approval of the conduct of their public officials and of the civic bodies."

Hague's zeal indeed went so far that he contributed "several hundred dollars, I think, more or less, not much" to the various public manifestations purporting to be spontaneous outbursts of antagonism to the respondents (R. 1359).

Upon the record as a whole, of which the foregoing is illustrative, the Circuit Court of Appeals, after commenting on evidence that petitioners "inspired at least some of these protests" (4 R. 105), very aptly said, "*In other words, Mayor Hague and his associates, reversing the usual procedure, troubled the waters in order to fish in them*" (4 R. 115). And the waters, once troubled, are supposed to stay so indefinitely; for Hague holds (R. 1360-3) that "protests," once lodged, continue in effect and may be a sufficient ground for denying application for public meetings *until revoked by those who filed them!* This official *dictum* naturally solves the vexatious problem of dealing with "undesirables" for all time. "Protests" are immortal.

Petitioners' unprovoked assault on the respondents was justified in their own mind by a simple philosophy—that "undesirables" have *no rights* (*e. g.*, R. 1367). "The record," said the Circuit Court of Appeals, "shows that [respondents] and their sympathizers were not permitted

to speak *because they were deemed undesirables by the city authorities.* The cries of impending riot raised by the [petitioners] are not candid" (4 R. 115). It need hardly be pointed out that their definition of "undesirables", "Reds", etc., leaves something to be desired in the way of logical exactitude.

Initially counsel for petitioners followed the Mayor's lead and took the position that if it could be shown that the respondents were in some way associated with "Reds", that might be offered, without more, as justification for their suppression. Early in the trial, indeed, counsel promised in sweeping terms that such a line of defense would be presented (R. 471). But petitioners chose to rest after respondents had closed their case, offered no affirmative proof on their own behalf although they were several times invited to do so by the District Court, and introduced not a scintilla of evidence probative of the respondents' "Redness". The District Court found to the contrary that respondents' purposes "are in the letter and spirit of our Constitution and laws," and that there was no competent proof that respondents have ever acted in a subversive manner (Findings B-4, B-5).

Being unable to prove respondents' subversiveness as a matter of fact, petitioners sought to use a suspicion of it in lieu of proof. Thus on cross examination of respondents' witnesses, notably Mayor Hague, petitioners offered as their own exhibits a sheaf of clippings from newspapers, pamphlets and reports which, they said, formed the basis of petitioners' *"state of mind"* or *belief* that respondents were subversive (Exhs. 3, D-9-11, 14, 16-27). The exhibits were received in evidence for this limited purpose (R. 1590 ff; R. 1429, 1416, 1433). Although petitioners are well aware of this, they still cavalierly refer to the exhibits as proof of the ultimate facts. Their testimonial strength will be appreciated when it is considered that at least an equivalent number of clippings could be gathered saying precisely the opposite—and

doubtless petitioners read those clippings as well as the ones that were offered in evidence. Similarly a newspaper story was introduced (Exh. P-15) carrying a headline to the effect that C. I. O. was preparing for "invasion" of Jersey City, and it is upon this headline, which eventuated in that peaceful distribution of circulars, brutally interrupted by the police, to which the court below adverted, that petitioners purport to have rested a considerable part of their program of supression. There is no legal proof that any threat of "invasion" was made by respondents anywhere, at any time.

If the civil liberties are to be granted or denied on the basis of a reading of newspapers—and a partial reading at that—then we have indeed traveled a long way on the road to despotism—constitutional law has become a law by headlines.

The basic question presented on the undisputed evidence is—*whether consistently with the Constitution and laws of the United States a municipality may deny the civil liberties to a particular class in the community in the alleged belief—without more—that that class is "undesirable", "un-American", "Red" or "subversive".*

A prior case arising in the same area—*Casey* v. *American Civil Liberties Union and Boot and Shoe Workers Union**—indicates that the petitioners have not always confined their strictures to C. I. O. and its supposed sympathizers. Two years ago they suppressed with equal rigor at least one local of the American Federation of Labor. Two years hence they may direct their power against still another group. Every citizen is a member of some minority group, whether political, racial, religious

*Referred to upon respondents' prior application herein for a writ of mandamus directed to a five-judge court purporting to act as the Third Circuit Court of Appeals.

or social. If respondents can be suppressed in any part of the United States today, why may not any one of us find himself—or a group of which he is a member—suppressed tomorrow, and on precisely the same theory? The District Court and Circuit Court of Appeals, in vindicating the rights of the respondents herein, vindicated the rights of all citizens. And it is vitally important to the future of democracy in this country that this Court should place its final imprimatur upon that holding. It is vitally important that, by affirming the decree under review, this Court should repulse the authoritarian attack on the base of the democratic process which is symbolized by Mayor Hague in Jersey City.

PART ONE:

THE SUBSTANTIVE CASE

POINT I

The provisions of the decree protecting "liberty of the person" are amply supported in fact and law.

A. *Exclusions and Removals*

Jersey City's first technique in dealing with "undesirables" is a throwback to Colonial days—happily it is unique to Jersey City at the present time (see R. 1352-3).

The police (for it is they who decide, Casey, R. 782-3) are said to be vested with a singular discretion (for the matter is discretionary, Hague, R. 1047). When dissatisfied with particular persons, the police exclude them from the town, or escort them to some remote part of the town and dump them there, or escort them beyond the City limits either by commandeering their automobiles or by use of police cars, or place them forcibly on the ferries or tubes and compel them to go across the Hudson to New York. This is the technique of "deportation," much agitated in the record.

Respondents and their attorneys quite frankly admit this practice. They could not well do otherwise. For instance, wholesale exclusion and removal of C. I. O. members and others occurred on November 29 (R. 265-6, 289-90, 291-2, 311-2, 363-5, 374-5, 382-4, 916-19). The proof is uncontradicted that the persons involved were creating no disorder, nor were they threatened with bodily harm by anyone other than the police themselves. Norman Thomas (R. 406-7, 448-9, 478-80) and others (R. 408-10, 444-5) were deported to New York late in April; there was no mitigation of the official policy.

The legal and official lights of Jersey City, far from apologizing for deportation at the trial, sought to justify it on a variety of theoretical grounds.

The Corporation Counsel at one point states, "well, we will answer that by saying that you cannot deport *if no unlawful acts are committed*" (R. 526). At a later stage of the trial counsel shifts his position and observes that deportation is justified of "those who are either committing unlawful acts *or that he knows are going to commit unlawful acts*" (R. 783; see 805-6).

Petitioner Casey, the Director of Public Safety, a believer in the technique of "shoving around" as a substitute for arrest (R. 749), likewise sanctions deportation, also on a variety of grounds. At R. 754, "my opinion is that a policeman has a perfect right to remove *the cause of that disturbance* no matter what it is, whether it is general or what the disturbance is." But at R. 752, "my opinion is that a policeman has a perfect right to escort anybody *from the seat of danger.*" Once having the alleged right to remove a person from the seat of danger, the police may go further and escort him *out of town*, even though a safe place could be found within the town (R. 751-4). And a human being may be excluded *in limine* from the boundaries of Jersey City under conditions which would justify his deportation if he had perchance entered the City (R. 782-3). Finally, the Director quite frankly stated that the real test is whether "you think you as Commissioner of Public Safety can get along better with him out of the community, and if you think he is going to cause trouble in Jersey City? A. Yes, as an undesirable, yes" (R. 782).

Mayor Hague takes an even more liberal view of the question of deportation. At R. 1042 the Mayor is of the opinion that "when a police officer puts them in a car and takes them somewhere not the police station," *"I think he is doing them a favor."* At R. 1080 he justifies deportation because the "radicals" and "undesirables" involved

want to be arrested! "Now, to arrest him would only mean what they desire. Their whole stock in trade is to appear in police courts for publicity purposes."

The Mayor believes that dissentients who were not born in this country should be "driven" out of here; and that those who were born in this country should be deported to concentration camps in Alaska (R. 1089). He views the deportation of "undesirables" from the limits of Jersey City as a minor application of that comprehensive principle of deportation (R. 1133).

B. *Unlawful Searches and Seizures*

Witnesses to the events of November 29 testified without contradiction that the police, without search warrant, indiscriminately searched and seized the persons and personal belongings of the distributors and of the observers. "Frisking" was the order of the day. These wrongs were committed by the police not only as to persons engaged in the attempt to distribute the circulars but as to persons who made no such attempt; and they were committed not only as to persons who were arrested but as to persons who were not arrested (R. 184-5, 218-9, 223-6, 293, 358-9, 363-4, 376, 384).

Nor do the police of Jersey City require the excuse of an "invasion" of leaflet distributors; they search and seize without warrant in less frenetic situations. Any C. I. O. car appears to be fair game for search at any time (R. 344-7, 503-4, 910-12, 959-60).

Counsel for Jersey City stated squarely on the record that search and seizure without warrant is *"the custom of the Jersey City police"* where the persons involved are *"suspicious looking characters"* (R. 507). The Director of Public Safety testified to like effect (R. 729-30, 731, 732):

> "Q. Now, Commissioner, in your exercise of your duties as head of the Department of Public Safety what are the instructions if any, in respect to stopping automobiles with foreign plates? A. They

don't—*it is not strictly foreign license plates. Any car that looks suspicious,* the orders of the department, my orders, are to look that car over, see who is in it. If there is anything suspicious about them, to bring them in and check up on them, which I think I got a perfect right to do under the law."

• • • • • • • •

"Q. *And if it looks suspicious to him he has the right to search the car?* A. Yes, sir, he has. *That's a ruling of the head of the Department of Pubic Safety.*

"Q. And he has the right to search the papers and valises and baggage of the occupant? A. *He has the right to look through the baggage, but not to read the correspondence, I guess, if that is what you are referring to; I don't know.**

"Q. That's in part. He has no right to look at the papers in a man's personal wallet? A. He has no right, no. He has a perfect right to search him for guns or fire-arms or black-jacks."†

• • • • • • • •

"Q. Tell me what the *general regulations* are to instruct the police as to *when a car or the occupants look suspicious.* Have you got any general instructions on that? A. *There is not.* That's up to the judgment of the man in charge of that car."

The testimony indicates that not even a "suspicion" of wrongdoing—in the vaguest and most general sense of that term—attached to the persons and cars seized and searched without warrant. The stories told by the witness Cometa and respondent Macri unmistakably indicate

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* In fact, personal papers are rifled and examined. See, *e. g.*, R. 503-4, 910-12.

† On Casey's cross examination there were offered in evidence J. C. Bureau of Identification photographs and data and Hudson County Bureau of Criminal Identification records (Exhs. D-3-8) on five men who were picked up and searched on February 6, 1938—according to the data, a gun was found in their car. Such discoveries, according to Casey, justify the policy of search on "suspicion." No connection was made out with any of the respondents (R. 1592). It is interesting to note that the disorderly conduct charge lodged against the men has since been dismissed by Judge KINKEAD in Jersey City; and the grand jury has taken no action on the charge of possession of a weapon although more than a year has elapsed.

that automobiles of union organizers are "spotted" by the police and "tailed". Periodic searches are then made in the fond hope that incriminating materials will be uncovered. The hope has proved vain, but the searches and seizures go on.

C. *Persistent Interference by Petitioners With Respondents' Rights of Communication and Locomotion, All Without Arrest or Trial by Due Process of Law.*

1. "Molestation"

Petitioners have kept union offices under constant surveillance by plainclothesmen (R. 263-4, 268-70, 504-6, 897). The effect, in the language of one union man (R. 269-70):

> "Q. You didn't like to see plainclothesmen and police on the streets, did you? A. *Not that I don't like to see them, but I feel they are there too much, in front of 76 Montgomery Street.*
>
> "Q. You mean they should have consulted you as to the disposition of the various police officers? A. I didn't say that.
>
> "Q. Was there anything you had to conceal that made you uneasy when the police were around? A. No, I have nothing to conceal.
>
> "Q. Well then, why did you object to them being around? A. *Because I have contacts with workers from the open shops that I am organizing, and when these workers come around to 76 Montgomery Street to see me and they see suspicious characters downstairs, the next time——*
>
> "Q. You mean the plainclothesmen and the policemen, do you? A. The plainclothesmen. *The next time they are afraid to come around, that they may get a report, and the next day lose their jobs.*"

The police have insinuated themselves by counterfeit means into union offices (R. 894-7), have molested workers in front of union headquarters (R. 897), and have seemingly indulged in petty tricks of annoyance (R. 909).

They have "tailed" the cars of union organizers (R. 503-4, 910-12), and they have on various occasions warned organizers not to engage in "solicitation" of workers to join the union (R. 504, 911-12). A captain of police construes a court decision to mean that in the absence of a strike organizers cannot park in front of a plant to talk to workers as they come out (R. 940). There is evidence of eavesdropping and molestation when, perchance, an organizer does succeed in talking to a worker (R. 940-1).

All this has proceeded in an atmosphere of tension and fear created through the hysterical, false statements of Mayor Hague and other City officials:

> "If the people of my city believe in me [Hague], as I know they do, all I ask is that the people of Jersey City aid me in my efforts to obstruct *this lawless element, whose only objective is to crush by terrorism; whose motive is to force itself upon our city for the purpose of destroying life and property by violence*" (Hague statement of December 26, 1937, Exh. P-42).

In fact the throttle on labor organizational work is as complete as can be found anywhere in the country. "It has hampered a whole lot," said respondent Macri, "the organization drive of organizing the unorganized workers in Jersey City" (R. 961).

2. Interference With Peaceful Picketing

The fixed policy of the Jersey City authorities is to prevent all picketing (by which is here meant the simple act of walking up and down a street without even a placard in hand: as discussed below)—not by arrest, but by forcibly smashing the picket line—*in any case where, in the opinion of the City authorities, the employer might be able to enjoin picketing on application to a court of equity.* The cops are to this extent to be substituted for the courts. An employer need resort to the courts only when the

police have denied him a *de facto* injunction. Thus the record is replete with legalistic discussions by policemen (R. 939-40) and the City officials as to the meaning and scope of decisions of New Jersey courts granting and denying injunctions to particular employers against picketing. This skullduggery has resulted in the following police rules as to peaceful picketing: In Jersey City, *although the picketing is peaceful, and does not violate any criminal statute or municipal ordinance,* the picket line is smashed if, in the opinion of the law enforcement authorities—

there is no strike (R. 767-8); or

the purpose of the picketing is to persuade workers to join a union (R. 772, 1289),—even in the case of a sweatshop (R. 1297-8; 1304-5); or

the purpose of the picketing is to protest against a runaway shop (R. 777, but *cf.* R. 778); or

people not employed in the particular shop are on the picket line (R. 854, 1289); or

the picketing is "mass" picketing, whatever that may mean (R. 1288); or

the purpose of the picketing is to obtain a closed shop (R. 1290); or

there is no labor trouble or labor dispute, whatever that may mean (R. 1305).

D. *Findings, Conclusions and Injunction*

On the uncontradicted proofs the District Court found that the petitioners "acting in their official capacities have adopted and enforced the deliberate policy" of excluding and removing respondents from the limits of Jersey City, exercising personal restraint over them and interfering with their locomotion on and free access to the public places of the City (Finding C-1); that the respondents were at the time of such exclusion, removal, restraint

and interference acting in an orderly and peaceable manner (C-2); and that the repressive policy is carried out by the police "*on their own administrative fiat without authority of law and without bringing the persons [involved] * * * before any judicial officer in order that such persons may be afforded a judicial hearing or day in court*" (C-3). The court concluded that the policy, in its various aspects, violated the privileges or immunities clause, the due process clause, and the equal protection clause of the Fourteenth Amendment, as well as the interstate commerce clause (Conclusions 2, 3); and entered an appropriate injunction prohibiting exclusion and removal, and enjoining all manner of restraint and interference except "in accordance with any right of search or seizure and any right of arrest and removal as speedily as possible before a judicial officer under existing law" (Decree, A-1, 2, 3). Interference with the right of communication in public places (other than at public meetings) is similarly enjoined (Decree, B-1).

The Circuit Court of Appeals was unanimous in confirming the findings and in affirming the pertinent injunctive provisions (4 R. 108, 109, 110, 142).

E. *The Pertinent Provisions of the Decree are in Accord With Applicable and Controlling Law**

1. As to Exclusions and Removals

The courts below rested primarily upon the *privileges or immunities clause* of the Fourteenth Amendment† in outlawing the municipal policy of "deportation" (4 R. 117). There is no doubt of the soundness of this position.

* The legal aspects of the entire case have been treated in Comment, "The Hague Injunction Proceedings," 48 Yale L. J. 257 (December, 1938), to which the Court is respectfully referred.

† "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *" (Fourteenth Amendment, § 1).

Freedom to pass without molestation throughout the United States is an attribute of national citizenship, protected against State interference, whether that takes the form of State statute or municipal ordinance, or acts *dehors* statute or ordinance but under color of State or municipal authority. *Williams* v. *Fears*, 179 U. S. 270, 274 (1900); *Twining* v. *New Jersey*, 211 U. S. 78, 97 (1908); *United States* v. *Miller*, 17 F. Supp. 65, 67 (W. D. Ky. 1936); *Marcus Brown Holding Co.* v. *Pollak*, 272 Fed. 137, 141 (D. N. Y. 1920); *United States* v. *Patrick*, 54 Fed. 338, 348 (D. Tenn. 1893); Willoughby, *The Constitution* (1910), pp. 181-2. These authorities stem from *Crandall* v. *Nevada*, 6 Wall. 35, 48-9 (1867) where, in declaring unconstitutional a Nevada tax on persons entering and leaving the State, this Court declared:

> "'Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States, from the most remote States or Territories, is entitled to free access, * * * to * * * every State in the Union. * * * For all the great purposes of which the Federal Government was formed we are one people, with one common country. We are all citizens of the United States and as members of the same community must have the right to pass and repass through every part of it without interruption as freely as in our own States.'"

As recently as 1935 this basic rationale was reaffirmed, the Court saying by Mr. Justice SUTHERLAND that among the privileges comprehended by the first section of the Fourteenth Amendment

> "undoubtedly is the right to pass freely from one state to another. * * * And that privilege, obviously, is as immune from abridgement by the state from which the citizen departs as it is from abridgement by the state which he seeks to enter. This results from the essential character of national citizenship, * * *."

Colgate v. *Harvey*, 296 U. S. 404, 429.

Nor can the privilege be invaded on any theory that disorder will result if particular people are allowed to enter or remain within a particular area. Judge FIELD, later Associate Justice of this Court, rejected that contention in 1874:

> "*Where the evil apprehended by the state from the ingress of foreigners is that such foreigners will disregard the laws of the state, and thus be injurious to its peace, the remedy lies in the more vigorous enforcement of the laws, not in the exclusion of the parties.* • • • The state cannot exclude them arbitrarily, nor accomplish the same end by attributing to them a possible violation of its municipal laws."
>
> *In re Ah Fong,* 1 Fed. Cas. 213, 217 (D. Cal.).

The Jersey City policy of deportation likewise offends against the interstate commerce clause (Article 1, Section 8, Clause 3). As the District Court specifically held (Conclusion 2) the movement of persons over state lines is interstate commerce. *County of Mobile* v. *Kimball,* 102 U. S. 691, 702 (1881); *Gloucester* v. *Pennsylvania,* 114 U. S. 196, 203 (1885); *Champion* v. *Ames,* 188 U. S. 321, 352 (1903). In *Colgate* v. *Harvey, supra,* this Court indicated that whatever doubt may have existed at the time of the *Crandall* case as to whether the state could consistently with the commerce clause interfere with movement of persons across state lines "has been resolved in later cases against the power of the state." 296 U. S. at p. 430. On this point this Court was unanimous in the *Colgate* case (*id.* at p. 444). See also *American Steel and Wire Co. of N. J.* v. *Davis,* 261 Fed. 800 (D. Ohio 1919).

The further constitutional vice inherent in the policy of deportation, as recognized by the courts below (4 R. 119), is that it does not rest upon any statutory basis and comprehends a *deprivation of the right to arrest and trial according to acknowledged forms of criminal procedure,* thus

offending flatly against the *due process clause* in the original and fundamental meaning of that clause. As this issue—namely, whether police are privileged to administer punishment in the absence of a statute defining the crime and the penalty, and without resort to arrest and trial—runs through the entire case, it is reserved for more extended treatment below.

2. As to Unlawful Searches and Seizures

The municipal policy respecting search and seizure is similarly violative of constitutional guaranties.

The Fourth Amendment to the Constitution of the United States reads:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation and particularly describing the place to be searched, and the persons and things to be seized."

Of the constitutional provisions dealing with search and seizure this Court has said that they are "of the very essence of constitutional liberty." *Gouled* v. *United States,* 255 U. S. 298, 304 (1921). The Court has also stated that those of the first ten amendments to the Federal Constitution which are "of the very essence of a scheme of ordered liberty", without which "neither liberty nor justice would exist", are to be deemed absorbed by the due process clause of the Fourteenth Amendment. *Palko* v. *Connecticut,* 302 U. S. 319, 325, 326 (1937). Hence today that clause would seem clearly to include a prohibition against unreasonable searches and seizures and so the Circuit Court of Appeals held:

> "We are unable to perceive any reason • • • why the right • • • should not stand on a parity today

with freedom of religion, of speech, of the press and of assembly as guaranteed by the First Amendment. All of these rights are of equal importance to the individual and in our opinion they stand as *pari materia*" (4 R. 133).*

The searches and seizures consistently perpetrated by the petitioners are clearly "unreasonable" within the definitions of that word laid down by the cases construing the guaranty. Petitioners do not pretend, for example, to have at hand before the search begins, circumstances warranting the belief that crime has been committed, much less direct knowledge that crime has been committed. They freely admit that they have authorized search without search warrant of "suspicious looking characters" and "suspicious" cars solely on the ground that they appear to be suspicious, *i. e.*, in the hope of procuring evidence by means of the search that a crime has been committed. This is a perversion of the constitutional guaranty, which forbids search except on probable cause (*Carroll* v. *United States*, 267 U. S. 132 [1925]; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357 [1931]; *State* v. *Giberson*, 99 N. J. L. 85 [1923]),—probable cause being defined as "reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the accused is guilty of the offense with which he is charged" (*Lane* v. *Penn. R. R. Co.*, 78 N. J. L. 672, 674 [1910]), or, in the language of another court, "direct personal knowledge, through * * * hearing, sight or other sense, of the commission of the crime by the accused." *Elrod* v. *Moss*, 278 Fed. 123, 130 (C. C. A. 4th, 1921). Search upon mere suspicion is precisely what was intended to be put beyond the pale (*Carroll* v. *United States*, *supra*, pp. 149, 154),

* That court also held that the right to be free of unreasonable searches and seizures "is a fundamental civil right * * * and a privilege of Federal citizenship. As such it is secure against abridgment by the states, by the privileges or immunities clause of the Fourteenth Amendment, as well as by the due process clause of that amendment" (4 R. 118).

and cannot be condoned on any plea of efficiency in crime detection. *Weeks* v. *United States*, 232 U. S. 382, 393 (1914).

Respondents urge that the Circuit Court of Appeals was correct in holding that the Fourteenth Amendment conferred a right to be free of unreasonable searches and seizures by the states and their instrumentalities. Assuming, however, that the Fourteenth Amendment does not apply, the New Jersey Constitution sufficiently covers the searches and seizures revealed by the record. Article I, Section 6 of that constitution contains language "substantially similar" to that appearing in the Fourth Amendment, and has been similarly interpreted by the Courts of New Jersey. (*Katz* v. *Eldridge*, 96 N. J. Law 382 [1921]; *State* v. *Condon*, 40 N. J. L. J. 293 [1917].) As the unlawful searches and seizures are part of a scheme or conspiracy hostile to Federal constitutional guaranties jurisdiction to enjoin them would exist in any event—they would represent an intimately connected local ground. (*Hurn* v. *Oursler*, 289 U. S. 238, 246 [1933].)

3. As to Interferences and Restraints Imposed upon Respondents without Arrest and Trial by Due Process of Law.

A substantial portion of the proof in this case illustrates a studied policy on the part of the petitioners to deprive respondents of the safeguards inherent in the traditional administration of the criminal law in this country—more particularly, a studied policy to deprive respondents of the right to test the legality of official action through *arrest and trial by due process of law*, and by the same token to displace the rightful jurisdiction of the courts. Such is the effect of the official municipal policy respecting deportations, detention under guise of arrest, "molestation," and interference with peaceful picketing. We take as a prototype the subject of interference with

peaceful picketing; identical considerations apply to deportations, "molestation," * etc.

If the police policy as to peaceful picketing were in terms embodied in a criminal statute, it would be unconstitutional in large part or altogether. In the recent opinion of this Court in *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468 (1937), Mr. Justice BRANDEIS, speaking for the majority, pointed out that peaceful picketing is a mere combination of the civil rights of free speech, free press and lawful assembly; as such it is protected against State invasion by the Fourteenth Amendment. "Members of a union might, without special statutory authorization of a State, make known the facts of a labor dispute, *for freedom of speech is guaranteed by the Federal Constitution*" (p. 478). Peaceful picketing is, therefore, not only lawful in itself, but guaranteed by fundamental constitutional provisions.

The further, fundamental and over-riding objection to the Jersey City policy is, however, that it rests upon no statutory basis whatever, and that it utterly misconceives the function of the police.

In respect of peaceful picketing as well as other rights of labor, Jersey City has substituted for justice under the law a "prerogative justice" which is administered with a police stick, is as summary as a blow on the jaw, brooks no question and permits of no appeal.

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* As to the category of "molestation", see particularly the suggestive language of *Wallace* v. *Ford*, 21 F. Supp. 624, 627-8 (N. D. Tex., 1937): *"The waiting, spying officer, ready to pounce upon his prey, is really antagonistic to the constitutional provisions which provide that there shall be certain preliminary steps taken before the citizen can be subjected to prosecution.* Those precautions grew out of the people's fear of the administrative and executive departments of government. They desired a real, functioning judicial power, even as they arranged for a fully panoplied legislative body. If the officer is to sit by the citizen, or in the citizen's place of business, and intimidate the timid and scare away the customer, then the citizen is already condemned before he has a trial. He is already branded before he has been pronounced guilty. The very fact that the officer is there is notice to the customer that the proprietor is distrusted. That he is not law-abiding. That he is unfair or fraudulent or crooked. *It is a handicap to the free man and is repugnant to our system of government."*

When a cop "breaks up" a picket line (or "deports" a citizen or the like) without making an arrest, he is administering punishment. The principle underlying criminal justice in the remaining civilized nations of the world, including the United States, is that punishment may be inflicted under the following conditions and not otherwise: (1) a clearly defined standard of criminal responsibility enunciated by the legislature or under express authority of the legislature; (2) notice to the accused of the crime supposed to have been committed by him; (3) opportunity to the accused to be heard in his own defense under the panoply of a fair trial.

These elements constitute that "due process of law" guaranteed by the Fourteenth Amendment against infringement by the several States or by any person acting under color of State or municipal authority. *Powell* v. *Alabama*, 287 U. S. 45, 68 (1932); *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934). *Cf. United States* v. *Ballard*, 12 F. Supp. 321, 325 (D. Ky. 1935); *People ex. rel. Gow* v. *Bingham*, 57 N. Y. Misc. 66, 70 (1907); *Delafoile* v. *State*, 54 N. J. L. 381, 387 (1892).

Police interference with peaceful picketing in Jersey City, as practiced over a considerable period of time with the sanction and under the specific direction of the City heads, violates each of the elements of due process of law and is lawless and unconstitutional from beginning to end. Mayor Hague was asked to name any criminal statute or municipal regulation which inhibits peaceful picketing and was unable to do so (R. 1368-73), and in fact there is no such statute or municipal ordinance. Absent a criminal statute or municipal regulation covering the ground, the police are without power or authority to break up picket lines or to manhandle pickets. But even if a criminal statute or municipal regulation did exist covering the ground, it would have to be enforced by arrest and fair trial; neither is accorded in Jersey City. (The point is well put by Mr. Arthur Garfield Hays when he

speaks of "the constitutional right to be arrested.'") The police policy as to peaceful picketing thus stands as unabashed, unexcused and unconstitutional hijacking. As was said by the court below, "When, as in the case at bar, such conduct receives the consent and approbation of those charged with the conduct of the city government, justice is destroyed. Such a condition is abhorrent in a democratic community" (4 R. 110).

POINT II

The provisions of the decree respecting circulars and placards are plainly correct. The municipal ordinances involved are void within the rule of *Lovell* v. *City of Griffin*.

A. *Circular Distribution*

Common experience shows that distribution of literature is the substance of the right of free press so far as labor unions are concerned. Here is what Jersey City has done to that right:

An ordinance of the City of Jersey City (4 R. 46—passed January 22, 1924) provides in sweeping terms that no literature may be distributed on the streets of the City. There is no provision whatever for securing permits. Violation is punishable by fine or imprisonment or both and the permissible punishment is increased for a second offense.

C. I. O. sought to test the constitutionality of the ordinance on November 29, 1937. As to the occurrences on the morning of that day, it is enough to say that the distri-

* So far as counsel can ascertain by study of the cases, the right of arrest and trial under the orderly modes of criminal procedure may be suspended only when martial law has been validly declared. See *United States* v. *Adams*, 26 F. (2d) 141 (D. Colo.), *app. dism. as moot*, 29 F. (2d) 541 (C. C. A. 8th, 1928); *Sterling* v. *Constantin*, 287 U. S. 378 (1932).

bution was wholly peaceful so far as the distributors and observers were concerned; and that, as the District Court repeatedly observed (R. 211, 288, 355-6, 369-70, 1003; *cf.*, 387-8, 1103-5), the ordinance could only be tested in the manner in which the respondents sought to test it, *i. e.*, by violation of its terms.

Jersey City met the test in characteristic fashion. Seven persons were arrested for violation of the ordinance but their trial and conviction in Judge Botti's court were a caricature of the forms of justice* (Exh. P-2; R. 313-24); six persons were, without color of justification, arrested and bound over to the Grand Jury on a charge of unlawful assembly † (R. 1193-7; Exh. P-3); other persons were simply stopped and roughly handled—not arrested—by a great battalion of police (*e. g.*, R. 221-2, 311-12, 289); leaflets were *confiscated* (R. 184-5, 221, 311, 346-7, 363, 415-6)—pure and unadulterated theft; and there were attendant wholesale deportations and unlawful searches and seizures.

On March 28, 1938, this Court in *Lovell v. City of Griffin*, 303 U. S. 444, finally and unequivocally disposed of the constitutional question concerning leaflet distribution. While it is now conceded that the Jersey City ordinance is unconstitutional (R. 368-70), that has not affected petitioners' behavior. As one police officer said, "We are enforcing the Jersey City ordinance, not the Constitution" (R. 422). Mayor Hague stated (R. 1239, 1241):

> "Q. Since the decision in the Georgia case, Mr. Mayor, your police have taken up circulars from persons attempting to distribute them in Jersey City, have they not? * * * A. Yes. * * *"

Police interference with distribution of literature by actual *confiscation* has continued and no steps have been

* The men served their sentence in full—bail was refused although appeal was promptly taken and is still pending.

† There has been no further prosecution of these charges to date.

taken by the City Commissioners to repeal the ordinance. At least seven witnesses testified to interference following March 28. Shortly after that date the witness Grace Milgram was stopped and her leaflets confiscated (R. 417, 422). There was like interference with leaflet distribution on April 30 (R. 408, 420, 448, 478-9). And there is abundant proof that leaflets of the Catholic Workers group were confiscated early in May, with attendant police violence, under the specific instructions of Chief of Police Walsh, who was present at the scene (R. 463-4, 473-4, 480-1, 884-6). In no instance which appears of record—neither on November 29 nor during April and May—was the distribution disorderly (apart from disorder created by the police themselves); nor was the literature provocative, obscene, or criminally libelous (Exhs. P-1, 4, 7, *cf.* 32); nor was there any littering of the streets.

Mayor Hague reinforced this indication of future policy by announcing from the witness stand that the City proposes to go on confiscating handbills of which he (*i. e.*, the City administration) does not approve. He said, for instance (R. 1035-6; see also R. 1035, 1184):

> "Q. Or P-7, Exhibit P-7? A. Well, I would say there is an objection to that; *that is not a proper circular to distribute amongst a community that is law abiding; that is a religious circular.*
>
> "Q. You think a religious circular should not be distributed? A. No, I do not. I think they ought to keep out."

Such declarations mean simply that Hague proposed to disregard this Court, and his police have embarked on that lawless policy.

It need, of course, hardly be mentioned that oppression of these respondents by use of an unconstitutional ordinance has taken place while other favored groups were violating the ordinance with the knowledge and tacit approval of the City fathers. There is testimony that litera-

ture of the Chamber of Commerce and literature advertising "bingo" games has been openly distributed on the streets of Jersey City (R. 932). The Director of Public Safety admits that cards of the Police Safety League (Exh. P-30) have been distributed by being placed in mail boxes (R. 726-7) in apparent violation of Section 2 of the ordinance (house-to-house distribution); and the Mayor admits distribution unquestionably in violation of Section 2 (R. 1214-15).

B. Display of Placards

Parallel with the invalid circular ordinance is the ordinance respecting placards—in terms prohibiting the carrying or display of any placard or sign of any nature or description on the public streets or in the public places of Jersey City (Exh. P-38, dated May 18, 1937). As might be supposed, the ordinance is particularly useful to the municipal officials in destroying the last semblance of the right of peaceful picketing—for it means that even in the limited class of cases in which working men are allowed to "picket" in Jersey City, they may not carry their message to the public in the normal and accepted way. The rigid enforcement of the no-placard policy against labor clearly appears from the testimony (R. 261, 267-8, 779, 784-6, 1288).*

It is almost supererogative to add that the no-placard policy is enforced solely against labor—not against other favored classes in the community. Thus, the policy is instinct with discrimination. Petitioners do permit placards and transparencies to be carried in parades (R.

* The Court may be amused, if not enlightened, by glancing at R. 784-6, where petitioners attempt to explain the distinction between distributing handbills from a picket line (the constitutional right to do so must be conceded in view of the *Lovell* case—although in practice Jersey City has paid no attention to this case), and display of the same information in the same form on placards carried by the pickets. Petitioners appear to find a fundamental difference between literature distributed on a horizontal plane and the same literature carried on a perpendicular plane, thus evolving a new geometrics of constitutional law.

781-2, 1295). The ground of distinction between marchers in parades and marchers on picket lines is illuminating on the general approach of the authorities of Jersey City to matters of social importance (Casey, R. 781-2):

> "Q. I said how about parades, do you allow placards in parades? A. I do. * * *
>
> "Q. And you do that because the ordinance in your judgment gives you the power to make a distinction between a parade and a picket line? A. It does, I think so. I may be wrong but that is what I think.
>
> "Q. And you have never consulted counsel on that either? A. No, I haven't; if it is wrong they will remedy it.
>
> Q. But all parades have the right, in your opinion, to carry placards? A. I never stopped it.
>
> "Q. You would have stopped it if it had been in violation of the law as you see it? A. If I got an opinion on it, yes.
>
> "Q. In the absence of getting an opinion, if you had come to the conclusion that it was a violation of law you would have stopped it, wouldn't you? A. I wouldn't stop it without an opinion on that, that is a very technical question. *That is interfering with societies which I think I shouldn't interfere, with lawabiding citizens I will have no trouble.*
>
> "Q. *And Mr. Commissioner, you do interfere with other societies known as trade unions in the carrying of placards, don't you?* A. *I do, yes.*"

C. *Findings, Conclusions and Injunction*

The District Court, on abundant evidence, found a "deliberate policy" of interference by force and violence with distribution of circulars, leaflets and handbills in the public places of the City, the literature sought to be distributed being in no case objectionable and the attempted distribution being in no case disorderly or otherwise offensive (Finding D, Circulars 1, 2, 3, 4). It likewise

found competent proof that the petitioners "threatened to pursue" that policy (5). Similar findings were made in respect of interference with the carrying and display of placards (D, Placards, 1, 2, 3, 4). In its conclusions of law (4, 5) the court voided the circular and placard ordinances as repugnant to the due process and equal protection clauses of the Fourteenth Amendment; and in its decree enjoined the petitioners from further interference with these civil rights, incorporating some of the language of the *Lovell* case in the clauses of its order* (Decree, B-2, 3).

The Circuit Court was unanimous in confirming the findings and in affirming the pertinent injunctive provisions (4 R. 111, 143).

D. *The Lovell Case is Controlling*

No extended argument seems necessary. The *Lovell* decision is *a fortiori* dispositive of the Jersey City ordinances because the latter, unlike that of the City of Griffin, are absolute prohibitions, not merely "previous restraints" by license or permit.

The courts below properly held that there was no constitutional distinction between circulars and placards; both fall within the rule of the *Lovell* case (4 R. 110-111). See Comment, 48 Yale L. J. 257, 264-5.

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* That part of the language in the *Lovell* case which refers to "ways [of distributing] which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants or the misuse or littering of the streets" and which is incorporated in the Decree obviously refers to subsequent punishment, and not to previous restraint as the petitioners have contended.

POINT III

The holding of the court below that the standard of anticipated disorder contained in the Jersey City ordinance as to public speaking is unconstitutional, is sound in law. The alternative, independent holding that the ordinance, whether or not the standard is *per se* unconstitutional, has been unconstitutionally applied to the respondents, is likewise sound; the concurrent findings of arbitrary and discriminatory enforcement are supported by ample evidence.

Having been denied the right to convey their message to the people of Jersey City by means of the printed word, respondents sought a forum where they might express their views by word of mouth, and incidentally criticize the official policy of suppression and present a "bill of grievances".

Respondents' first recourse was to *private* meeting halls. It has been noted above that search for such halls proved unavailing. Mayor Hague's explanation of this exceptional embargo may be taken as correct—it resulted from the official campaign of vilification and abuse directed against the respondents, combined with an implied threat of official reprisal; to which may be added the threat of enforcement of an extraordinary City ordinance (R. 21—dated January 21, 1920) forbidding hall-owners, under severe penalty, to rent halls without first obtaining permits for any meetings whereat certain types of subversive doctrine are to be advocated—but conferring no power on the City authorities to deny permits. The constitutionality of this ordinance was assailed in the bill of complaint (R. 7-9).* Although the District Court was "skeptical enough

* A New Jersey court has interpreted the ordinance as above set forth and judicially held it to be *"most peculiar"*. *Hudson County Committee* v. *Hague*, N. J. Chanc., #117-203, January 19, 1937 (FIELDER, *V. C.*).

to realize that municipal authorities (like other authorities) are possessed of indirect means of coercion" (R. 112), it did not award injunctive relief on the subject of private halls, holding that proof of coercion must be supported by admissions of the hall-owners themselves—a ruling which emphasizes the heavy burden cast on the respondents by the trial court in proving their case, a burden which they carried successfully on every other phase of the controversy.

The objective fact remains that respondents could obtain no private halls in Jersey City. The issue of *public* meetings, therefore, was of more than theoretical importance; if the public places of the City were not made available to them, the respondents would be literally without a voice in Jersey City.

Respondents C. I. O. and A. C. L. U., in the latter part of December, 1937, duly applied for permits to hold meetings in the public places of Jersey City. It was a last resort.* When, by January, 1938, this civil right had also been denied by the petitioners (R. 27-46; Exh. P-13), the circle of suppression was complete. So far as these respondents are concerned in the Jersey City area the major civil rights, although constitutionally guaranteed, are effectively nullified. They are non-existent also for numerous organizations and persons whose only fault is that they have the misfortune to be regarded by the petitioners as allied in sympathy or in motive with the respondents: thus from December, 1937 to June, 1938, the time of the trial herein, permits for public meetings were likewise denied to a variety of organizations including the American Whig-Cliosophic Society of Princeton University (proposing Senator Borah as speaker) and the Catholic Workers. Nor can there be any doubt that this condition, unbelievable in this democracy, will be perpetuated in Jersey City unless stopped by the decree under review.

* See text of the C. I. O. application (Frazer to Casey, December 23,—R. 33-4).

The Ordinance

Denials of the right to hold meetings in public places were nominally predicated upon an ordinance believed to be unique among municipal regulations in this country. It imposes a police pre-censorship tied to a standard—prevention of riot, disorder or disturbance—which this Court has clearly held to be improper and invalid.

The ordinance (R. 26—adopted April 15, 1930) provides that "no public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City" shall take place without a permit first obtained from the Director of Public Safety. Application for a permit must be made at least three days prior to the proposed parade or assembly. The Director may refuse to issue the permit when "after investigation of all of the facts and circumstances pertinent to said application, he believes it to be proper to refuse the issuance thereof; provided, however, that said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage". Violation of the ordinance is a penal offense.

Rulings of the Circuit Court of Appeals and the District Court as to this Ordinance

The Circuit Court of Appeals held that the standard set up in the ordinance for the denial of permission to hold public meetings is unconstitutional as a previous restraint; and that, regardless of the constitutionality of the standard *per se*, the ordinance had been applied to the respondents in an arbitrary and discriminatory, and therefore unconstitutional manner. The pertinent injunctive provisions of the decree under review (paragraphs B-4[a], [b], [c], [d] of the decree entered by the District Court, as modified by the Circuit Court of Appeals, 4 R. 164) make this holding effective as follows: Petitioners are

restrained from interfering with the holding of meetings by the respondents in the public parks,* streets and places of Jersey City, provided applications for permits to hold such meetings are made three days in advance, and provided further that a permit may be refused, in the case of the public parks, because of conflict with recreational schedules and, in the case of the public streets and places, because of conflict with the easement of public passage. Petitioners are also restrained from withholding reasonably adequate police protection to the respondents at meetings held by them as aforesaid. Petitioners are also specifically restrained from continuing to refuse these rights to certain named individuals on whose behalf permits were applied for by respondents in December, 1937.

The decree as entered by the District Court differed from the decree under review only in the following respect: it provided that the respondents' rights as to the public streets and places other than the public parks were to continue "unless and until" the petitioners adopted and enforced the "deliberate policy" of forbidding meetings of any kind in such streets and places. The Circuit Court modified by striking out the "unless and until" clause. The modification was unquestionably proper.† Cases relating to freedom of expression make no distinction between parks and streets and there was no special reason for establishing a distinction in the case at bar. It did not appear from the record that traffic conditions are such in Jersey City that it is impracticable to hold any street meetings therein; indeed the contrary plainly appeared in the record. So long as traffic does not render all street

*The petitioners' argument that the use of the public parks for speaking purposes is not a proper park purpose is absurd in view of the fact that the ordinance, which they are seeking to uphold, contemplates speeches in parks.

† Respondents did not appeal from the District Court decree because it was not anticipated that Jersey City would adopt the policy of barring all street meetings; until it did, respondents were entitled under the District Court decree to equivalent rights in the streets and parks. Respondents disagreed, however, with the distinction drawn by the District Court and so stated in their brief as appellees in the Circuit Court of Appeals (Brief, p. 44).

meetings impracticable, the municipality is not justified in barring them altogether, even though the parks are held open for the purpose—and so the Circuit Court of Appeals held. If, in the remote and presently unforseeable future, traffic conditions should become so acute in Jersey City as to make all street meetings impracticable, the City would of course be entitled to deny permits for street meetings under the very decree as modified, since conflict with the easement of public passage would then exist in every case.

In basic theory there is no material variance between the decree as entered by the District Court and the decree as modified by the Circuit Court of Appeals. Both insure respondents a public forum in Jersey City, and both hold that anticipation of disorder is an invalid ground for denying the right.

It will now be shown that the decree under review is sound, resting as it does upon the alternative propositions that the standard carried in the ordinance is *per se* unconstitutional (A and B, *infra*), and that the ordinance has in any event been unconstitutionally applied to the respondents (C, *infra*).

A. The standard set up by the ordinance imposes a previous restraint and is void.

1. *Meaning of Previous Restraint*

It is settled that freedom of speech and of the press are secured by the due process clause of the Fourteenth Amendment against invasion by the States and their governmental agencies. *Near* v. *Minnesota*, 283 U. S. 697, 707 (1931); *De Jonge* v. *Oregon*, 299 U. S. 353, 364 (1937); *Lovell* v. *City of Griffin*, 303 U. S. 444, 450 (1938). And just as freedom of the press embraces as an essential attribute the right to circulate as well as the right to publish (*Lovell* v. *City of Griffin, supra*), so freedom of speech embraces as an essential attribute the right to address an

audience as well as the right merely to talk (*e. g., Whitney* v. *California,* 274 U. S. 357 [1927]; *De Jonge* v. *Oregon, supra;* see also *Palko* v. *Connecticut,* 302 U. S. 319, 324 [1938]). Both guaranties are designed to protect the right of a man to *communicate* his thoughts to his fellows, and not alone the right to express those thoughts.

In their primary meaning, freedom of speech and freedom of the press mean freedom from previous restraint.* This Court has said that

> "While this freedom from previous restraint upon publication cannot be regarded as exhausting the guarantee of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision."
>
> *Lovell* v. *City of Griffin, supra,* pp. 451-2.
> See also, *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936).

The essence of the doctrine which prohibits previous restraint is that expression may not be curtailed *in advance;* that gag laws are inconsistent with freedom. If a man in speaking adds the persuasion of his fists, he may be prosecuted for disorderly conduct; if what he says is libelous or obscene or incites to riot or sedition within the rule of clear and present danger, he can and should be held accountable under the relevant provisions of civil and criminal law. But he cannot be prevented by pre-censorship from giving utterance to his thoughts, whatever they may be. As Judge Biggs said below: "If the words used by a speaker are slanderous, the injured person may sue for damages in a court of law. If the speaker incites to riot or crime, the police may arrest him forthwith and the criminal processes of a democracy are available to punish him." But "Speakers may not be prohibited from

* They have been extended to include certain prohibitions on subsequent punishment as well. See, *e. g., Herndon* v. *Lowry,* 301 U. S. 242 (1937).

speaking because they may say something which will lead to disorder" (4 R. 114-5). See also 4 Bl. Comm. 151, 152.

In the words of this Court, "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *De Jonge* v. *Oregon, supra,* p. 364.

Examined in the light of these accepted principles, the standard of disorder prescribed by the Jersey City ordinance is seen to be an invalid previous restraint. Under the ordinance a man may be forbidden *in advance* the right to address the public on the ground that his words will, in the opinion of the Director of Public Safety, provoke disorder. Worse, he may be refused the right to talk on the ground that disorder will be occasioned, not by what he may say, but by those who attend his speech, perhaps with that very purpose in mind. Under the Constitution a speaker may, if his words violate a valid law, be punished for what he says *after* he says it, but he may not be barred the right to speak *in limine* on the basis of a guess that he will be lawless, or that others will be lawless and riot in resentment against him or what he may choose to say. On the contrary, it is the function of democratic government, in the event disorder is apprehended, to take whatever steps may be necessary to protect the speaker against those who would interfere with or molest him. The Circuit Court of Appeals cogently stated the implications of any contrary rule:

> "The interpretation of the rights of free speech and free assembly contended for by the [petitioners] is shocking and places these rights in the hands of those who would destroy them. If the ill-intentioned threaten riot, speech may not be had. Under what conditions then would not the cry of riot be raised. Applying the [petitioners'] doctrine liter-

> ally, political speakers might not stump a city in an election if their opponents objected to what they had to say and threatened disorder. The strict application of such a rule would result eventually in the existence of but one political party as is now the case under totalitarian governments'' (4 R. 115).

The decree under review states and enforces the constitutional rule and does not go beyond it.

The respondents do not contend that there is, nor did the courts below find, any constitutional or social objection to the requirement of permits for public meetings. Permits must be applied for three days in advance: so said the ordinance and so says the decree. The City is thus given notice of the gatherings that are to be held, and is enabled to make whatever preparations or take whatever precautions it deems necessary. Furthermore, under the decree Jersey City is properly given the right to refuse permits on the ground of traffic conditions or conflicting recreational schedules—to this extent the exercise of the right of free speech is reasonably accomodated to other uses of the streets and parks. What petitioners are precluded from doing is anticipating a riot before an applicant has opened his mouth and denying him the right to speak in public places on the basis of such a guess. That anticipation of riot or disorder is not a valid ground for denying the right is settled by *Near* v. *Minnesota, supra.*

2.—NEAR V. MINNESOTA *and Like Cases Controlling.*

Near v. *Minnesota* involved a Minnesota statute which provided that any person in the business of ''publishing a malicious, scandalous and defamatory newspaper'' was guilty of a nuisance and subject to a permanent injunction directed against the further publication of the paper. An action praying the issuance of such an injunction was instituted against the plaintiff Near on the ground that his paper, the Saturday Press was ''scandalous'' within the

meaning of the statute and therefore constituted a genuine threat to the peace and order of the community. The record in the case left no doubt that the Saturday Press was in fact conducive to breaches of the peace. There was reference to "an attempt to assassinate one Guilford, one of the original plaintiffs, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published" (p. 704). Apprehension of violence from the continued publication of the newspaper was apparently well founded:

> "The articles in question also state that, when defendants announced their intention to publish the Saturday Press, they were threatened and that soon after the first publication Guilford was waylaid and shot down before he could use the firearm which he had at hand for the purpose of defending himself against anticipated assaults. It also appears that Near apprehended violence and was not unprepared to repel it. There is much more of like significance.
>
> "The long criminal career of the Twin City Reporter—if it is in fact as described by defendants—and the arming and shooting arising out of the publication of the Saturday Press serve to illustrate the kind of conditions in respect of the business of publishing malicious, scandalous and defamatory periodicals by which the state legislature presumably was moved to enact the law in question. • • •" (Minority opinion of Mr. Justice BUTLER, pp. 731-2).

The Minnesota Supreme Court concluded that the publication of the Saturday Press should be enjoined because it was "scandalous" and "the distribution of scandalous matter • • • tends to disturb the peace of the community", and "to provoke assaults and the commission of crime" (p. 728), the prevention of which was the object of the statute. This Court did not question the correctness of the findings. Freely assuming that the Saturday Press was a threat to peace and order, the Court nevertheless held that the statute under which its publication had been

enjoined was a prohibited previous restraint. Even though there the restraint rested on judicial findings based on past experience with the offending publication, and not as here on the mere guess of an administrative officer, the statute was adjudged unconstitutional on its face (pp. 721-2):

> "Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. *Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication.* 'To prohibit the intent to excite those unfavorable sentiments against those who administer the government is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions of their characters and conduct' [Madison's Works, Vol. 4, p. 549]. *There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication.* As was said in *New Yorker Staats-Zeitung* v. *Nolan*, 89 N. J. Eq. 387, 388, 105 Atl. 72: 'If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited.' The danger of violent reactions becomes greater with effective organization of defiant groups resent-

> ing exposure, and if this consideration warranted legislative interference with the initial freedom of publications, the constitutional protection would be reduced to a mere form of words." (Italics ours.)

Judicial condemnation of the standard of anticipated disorder could not be clearer.

This Court again indicated the repugnance of the standard to the constitutional guaranty in *De Jonge* v. *Oregon, supra.* The Chief Justice, speaking for the unanimous Court, there held that a Communist could not be subjected to *subsequent punishment* for proselytizing for Communism at a meeting held under the auspices of the Communist Party, assuming throughout that the Communist Party represented a revolutionary movement. In the case at bar the petitioners have acted on the theory that the label of Communist (or "undesirable", "Red", "un-American" or the like) attached to the subject matter of a speech, or to the speaker, or to the sponsor of the meeting, in and of itself presages disorder sufficiently to warrant denial of a permit under the ordinance; and it is upon consideration of such factors that action under any such ordinance is bound, in the long run, to be based. This demonstrates, in a somewhat different aspect, the unconstitutionality of the ordinance, for certainly what cannot be punished if done may not be prevented in advance. Said the Court in the *De Jonge* case:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. * * * If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the state

> instead of prosecuting them for such offenses seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge" (pp. 364-5).

It is likewise "a different matter when the state instead of prosecuting them for such offenses seizes" upon prevision of disorder as a ground for prohibiting upon pain of criminal penalty "a peaceable assembly and a lawful public discussion".

Lower court cases accord with the *Near* case in striking down attempts to prevent free expression on the ground that disorder will follow if it is allowed. See, *e. g., Dearborn Pub. Co.* v. *Fitzgerald,* 271 Fed. 479 (D. Ohio, 1921) which involved an effort on the part of the Cleveland law enforcement officials to prevent the distribution in the public places of Cleveland of the Dearborn Independent. The officials had announced that because of the inclusion of certain anti-semitic articles in the plaintiff's paper, they would permit no further public sales of it, and they threatened to arrest anyone who attempted to sell it. They sought to justify their position by arguing that if the papers were sold in the streets, they would "create religious and racial dissensions and create breaches of the peace". The court decisively rejected the argument that anticipation of disorder could validate the ban:

> "Nothing appears to indicate who were or might be excited by its sale to break the peace. It would be a libel, it seems to me, on people of the Jewish race to assume that they are imbued with such a spirit of lawlessness. If it be assumed that the article might tend to excite others to breaches of the peace against people of the Jewish race, the reply is plain. *It is the duty of all officials charged with preserving the peace to suppress firmly and promptly all persons guilty of disturbing it, and not to forbid innocent persons to exercise their lawful* and equal rights" (p. 483).

The court concluded that:

> "If defendant's action were sustained, the constitutional liberty of every citizen freely to speak, write and publish his sentiments on all subjects, being responsible only for the abuse of that right, would be placed at the mercy of every public official who for the moment was clothed with authority to preserve the public peace, and the right to a free press would likewise be destroyed" (p. 485).

In New Jersey, the theatre of the petitioners' operations, a similar view has been taken. Thus in *American League of the Friends of New Germany* v. *Eastmead*, 116 N. J. Eq. 487 (1934), the court stated that

> "If lawless elements in the community, instead of ignoring such propaganda or meeting it by sound argument, resort to riot, it is the duty of the police to protect the lawful assemblage and to repress those who unlawfully attack it" (p. 488).*

Similarly, in granting an injunction in *Hudson County Committee* v. *Hague* (discussed *supra*), Vice Chancellor FIELDER stated:

> "It is also the duty of the police to suppress by arrest if necessary persons who may express violent disagreement with what may be said at such meetings, rather than punish those who are threatened with attack."†

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* A suggestive case of similar purport is the famous English "skeleton army" case (meetings of the Salvation Army broken up by "skeleton army"), where FIELD, *J.*, said (*Beatty* v. *Gillbanks*, 9 Q. B. D. 308, 314-5 [1882]): "* * * What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants [Salvation Army] and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition, * * *"

† It should be noted that these New Jersey cases establish the impropriety of the ordinance under the New Jersey Constitution as well as under the Fourteenth Amendment. Article 1, Section 5 of the former provides: "Liberty of speech and the press. * * * Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that

Of the foregoing cases invalidating previous restraints based upon anticipation of disorder, the *Near* and *Dearborn* cases involved freedom of the press, the *De Jonge* and New Jersey cases freedom of speech. The Circuit Court of Appeals stated that "there is strong analogy between the right freely to publish the written or printed word, and the right here in issue freely to speak in a public assembly" (4 R. 114). The law applicable to the guaranties is the same. This Court always couples them together, revealing their essential identity. Mr. Justice CARDOZO spoke of "the freedom of speech which the First Amendment safeguards against encroachment by the Congress" and "the *like* freedom of the press." *Palko* v. *Connecticut*, 302 U. S. 319, 324 (1937). In *Lovell* v. *City of Griffin, supra,* the Court points out that "freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." The Court cites for this proposition, without making any distinction among them: *Gitlow* v. *New York,* 268 U. S. 652, 666 (press); *Stromberg* v. *California,* 283 U. S. 359, 368 (speech); *Near* v. *Minnesota,* 283 U. S. 697, 707 (press); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (press); and *De Jonge* v. *Oregon,* 299 U. S. 353, 364 (speech).

3. *The Ordinance Not a General Police Power Regulation*

The petitioners have attempted throughout to obscure the real nature of the regulation here involved by arguing

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right. No law shall be passed to restrain or abridge the liberty of speech or the press." The standard of anticipated disorder is repugnant to both.

Thomas v. *Casey*, 121 N. J. L. 185, relied on by the petitioners, is a lower court case now pending on appeal before the New Jersey Court of Errors and Appeals. The holding in the *Thomas* case is at variance in theory with the two cases discussed above as well as with *State* v. *Butterworth*, 104 N. J. L. 579, decided by the Court of Errors and Appeals in 1928 and mentioned *infra*, p. 62.

that the ordinance is not directly concerned with free speech, but seeks only to regulate the manner in which public places of the community may be used; whence it follows, they contend, that it is not a previous restraint. It suffices to say in reply that undoubtedly *general police power regulations having nothing to do with speech or the press as such are not considered to be previous restraints.* Thus ordinances and statutes may constitutionally be passed which require that permits be obtained from the building, health and fire departments before a building is used to house a newspaper plant. Newspapers may likewise be compelled to pay a social security tax, to enter into collective bargaining with their employees, and the like.

> "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity *from the application* of general laws * * *. The regulation here in question has no relation whatever to the *impartial distribution* of news."
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> *Associated Press* v. *N. L. R. B.*, 301 U. S. 103, 132-133 (1937).

These regulations find their origin, not in the subject matter of the constitutional guaranty, but in the exigencies of communal life which make general rules on fire, sanitation and the like indispensable. These rules, because they have "no relation whatever to the impartial distribution" of the written word as such, are *not* regarded as previous restraints. The same reasoning applies to the right of speech; a speaker, like a newspaper, "has no special immunity from the application of general laws." Certainly a speaker may be required to conform with non-discriminatory regulations based on traffic conditions and proper regard for public recreation other than public meetings.

> "It might be proper on account of the peculiar condition of affairs in a city, that street parades should be confined to certain streets, or should be conducted within certain hours of the day, or should be forbidden in the night time, or that the police department should have some previous notice, or that there should be other reasonable regulations respecting them, justified by such a condition that it would be apparent that regulation * * * was the object of the ordinance. * * *"
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> *Anderson* v. *City of Wellington*, 40 Kans. 173, 180 (1888).

The decree leaves the petitioners entirely free to deny permits on the ground of traffic necessities or conflicting recreational schedules. Such considerations are of the nature of a "general law" having "no relation whatsoever to the impartial distribution of the spoken word." But the standard of anticipated disorder prescribed by this ordinance does bear a definite relation "to the impartial distribution of the spoken word", for it depends upon a prevision of what the speaker will say and of the effect he or his words will have on those who listen to them. The direct connection between the criterion carried in the ordinance and the subject matter of the contitutional guaranty is in fact freely admitted by the Jersey City officials. For in their application of the ordinance, they at different times have purported to consider such factors as the subject matter of a proposed speech, the identity of the person who is to make it, the auspices under which it is to be made, the effect they believe each of these will have upon the persons who attend the meeting, and the probable reaction of the populace to the speech in the light of "protests" received and other supposed indicia of public opinion. Obviously, a standard dependent upon such factors impinges directly on the right to speak, and, in the words of Judge Biggs "prohibits peaceable assembly except upon terms repugnant to free speech" (4 R. 112).

Insofar as the ordinance embodies the criterion of anticipated disorder, it is not a general police power regulation, but the precise kind of previous restraint denounced as invalid by prior decisions of this Court.

4. DAVIS *v.* MASSACHUSETTS *Is Not In Point Here, and In Any Event Does Not Represent Good Law Today.*

Beyond an ineffectual argument to show that the ordinance cannot have anything to do with free speech because it relates to highways and parks, petitioners make no serious effort to defend the ordinance against the charge that it imposes a previous restraint; they are most gingerly in their treatment of *Near* v. *Minnesota* and like authority. Instead, they rest their argument in support of the validity of the ordinance on *Davis* v. *Massachusetts*, 167 U. S. 43, decided by this Court in 1897. They assert that it "stands for two distinct propositions: (a) individuals have no general constitutional right to speak or assemble in public places, contrary to prohibitory regulations of municipalities, acting under proper delegation of authority; (b) *arbitrary application* [*sic*] of such ordinances cannot be complained of by individuals, since the greater power of absolute and proprietary control, contains the lesser of *arbitrary or discriminatory application* [*sic*]" (Brief in Support of Petition for Writ of Certiorari, p. 17).

It is submitted in reply (a) that *Davis* v. *Massachusetts* is wholly distinguishable from the case at bar; and (b) that even its precise holding is no longer law. It is further submitted that the propositions above quoted, supposed to derive from the *Davis* case, are not pertinent to the case at bar, and in any event do not represent existing law; on the contrary, the law is (c) that a municipality may not, consistently with the Federal Constitution, prohibit the use of all public places for speaking purposes—there is a constitutional right to some public forum; and (d) that even if a municipality might constitutionally deny all public forums, it may not grant them subject to an invalid previous restraint.

(a) *Davis* v. *Massachusetts wholly distinguishable from the case at bar.*

Davis v. *Massachusetts* involved an ordinance of the City of Boston which required that a permit be obtained for any speech to be made in the public places of the City. The ordinance contained no standard or standards for the refusal of a permit. The defendant Davis, without applying for a permit, attempted to make a public address on the Boston Common. He was convicted for violating the ordinance, and his conviction was affirmed both by the Supreme Judicial Court of Massachusetts and by this Court.

In so far as the ordinance in the *Davis* case required that a permit be obtained, there could be no constitutional objection to it. As we have already pointed out, it is entirely reasonable for a municipality to insist upon being given notice of proposed public addresses, and the lower courts so held herein, providing in the decree for due notification to the City authorities. The fact that Davis spoke without even applying for a permit marks, as the Circuit Court of Appeals noted (4 R. 116), one controlling distinction between the *Davis* case and the present case.

More important, however, is the fact that the ordinances in the two cases are totally dissimilar. Unlike the Jersey City ordinance, which conditions refusal of permits upon an anticipation of disorder, the Boston ordinance did not in terms prescribe any standard for refusal. This Court naturally assumed, when passing on the Boston ordinance, that in enforcing it the administrative authority was free to and had abided by constitutional criteria: traffic conditions, etc. The present ordinance is fundamentally different. It lays down a standard which we have shown to be an unconstitutional previous restraint, and leaves the administrative official no room for applying a constitutional standard even if he wishes to.

The *Davis* case does not, therefore, qualify or rebut the conclusion that the standard of anticipated disorder is unconstitutional. It is a holding that the right to speak may be *constitutionally* conditioned—a point which is conceded. This Court took the view that Davis had been validly convicted and punished because he violated a law which could have been constitutionally applied (and Davis made no effort to show that it had been unconstitutionally applied as to him). Mr. Justice WHITE's opinion summarized the point which this Court deemed at issue in the *Davis* case as follows:

> "In the brief of counsel for plaintiff in error, many presumed errors are elaborately discussed, all of which when analyzed rest on the assumption that there was a right in the plaintiff in error to use the Common of the City of Boston *free from legislative or municipal control or regulation*" (p. 46).

That assumption was erroneous and this Court so held. The holding has nothing to do with the validity of an ordinance carrying a standard of anticipated disorder.

The State cases cited by petitioners are distinguishable on precisely the same grounds.

In *People ex rel. Doyle* v. *Atwell,* 232 N. Y. 96 (1921), the ordinance required a permit from the Mayor as a prerequisite to a public meeting, but it laid down no standard. The Court indeed looked to the application of a valid standard, *i. e.,* "acts which tend to hinder public travel" (p. 100). Doyle lost because he had spoken without applying for a permit, in clear violation of an ordinance presumptively valid. The precise holding was simply that *because* the ordinance was valid on its face, *habeas corpus* was an improper remedy.

People v. *Smith,* 263 N. Y. 255 (1934), fares little better on close analysis. There, too, the "defendant not

having applied for a permit" was convicted for talking without one. The ordinance under which he was convicted did not prescribe an unconstitutional standard, and the consequent affirmance of Smith's conviction has not the remotest relevance to the case at bar.

City of Duquesne v. *Fincke*, 269 Pa. 112 (1920), also involved an ordinance merely requiring a permit for public meetings, which was violated by the defendant, and *Commonwealth* v. *Egan*, 113 Pa. Super. Ct. 375 (1934), was a case of conviction for inciting to riot, not a prohibition of the exercise of the right of free speech. We agree entirely with the statement of the court in that case that "Rights of free speech and assembly must be exercised in subordination to reasonable rules and regulations adopted by proper municipal authorities in regard to *use* of public streets and buildings" (p. 383).

The several other cases cited by the defendants are similarly distinguishable. There is no need to analyze them here. None of the cases cited in any way derogates from the decisive effect of *Near* v. *Minnesota*.

(b) *Even the precise holding of the Davis case no longer law.*

We have seen that the precise holding of the *Davis* case, namely, that a City may require by ordinance that permits be applied for, without enacting a standard for the granting or denial of the applications (thus leaving room for the application of a valid standard), has no bearing on the constitutionality of an ordinance which not only requires a permit but conditions its issuance upon a standard plainly imposing a previous restraint. Because the petitioners rely upon the *Davis* case so heavily, however, it should be added that even its precise holding is no longer good law.

In the first place, the *Davis* case was decided before this Court had occasion to pass directly on the amount of power that could constitutionally be delegated to an administrative official. Since *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, decided in 1935, this Court has defined the limits of permissible delegation; and it has certainly held that the delegation is improper if *no* standard of action is prescribed. See also, *Schechter* v. *United States*, 295 U. S. 495 (1935). In the field of freedom of expression, this doctrine was carried to its logical conclusion in 1938 by the decision of this Court in *Lovell* v. *City of Griffin*, *supra*. An ordinance of the City of Griffin prohibited "the distribution of literature of any kind, at any time, at any place, and in any manner without a permit from the City Manager" (303 U. S., p. 451)—just as the Boston ordinance involved in the *Davis* case prohibited the making of public addresses of any kind, at any time, and in any manner upon any of the public grounds of Boston without a permit from the Mayor (167 U. S., p. 44). The ordinance of the City of Griffin was held "invalid on its face" (303 U. S., p. 451) because (among other reasons) no standard was established for the City Manager's action. On identical reasoning the ordinance involved in the *Davis* case would, we think, be held invalid today, if the question of its constitutionality were again presented for determination.

The authority of the *Davis* case is further weakened by the fact that in 1897, when it arose, this Court had not decided that freedom of speech and of the press were included within the orbit of the Fourteenth Amendment. (See *e. g.* District Court opinion herein, R. 78; Circuit Court of Appeals opinion herein, 4 R. 116; minority opinion of Mr. Justice BUTLER in *Near* v. *Minnesota*, *supra*, pp. 723-4.)

Mr. Justice WHITE's opinion reflects the doctrinal background of his day, and its authority is qualified at the present time because the entire background has changed. For example, the analogy pressed in the *Davis* case, and

by the petitioners herein, between the interest of the public authorities in the public places and the interest of a private home owner in his home, becomes inapposite once it be granted that the Fourteenth Amendment protects against invasion of the right of free speech. To the private home owner, the strictures of the Fourteenth Amendment do not apply; to the public authorities they do. Today a municipality must operate the places under its control in the light of the pertinent free speech guaranty; in 1897 a municipality was under no such obligation so far as the Federal Constitution was concerned.

Mr. Justice WHITE's view of the proprietary interest of a municipality in its public places "does not seem consonant with the expressions of the Supreme Court upon germane subjects in a later period"; "it cannot now be doubted that a city owns and its officials administer its streets and parks, not as private proprietors, but as trustees for the people" (4 R. 116-7). One of the purposes of the trust is to implement the right of speech (*id.*).

(c) *A municipality may not prohibit the use of all public places for speaking purposes.*

The petitioners have consistently argued on the basis of the *Davis* case that a municipality may, if it wishes, absolutely prohibit all meetings in public places. Except as a basis for their untenable "greater and lesser" power theory (see d, *infra*), it is difficult to see the materiality of this proposition from petitioners' point of view, since by the ordinance in question no attempt is made to bar all public assemblies in public places. Since the argument that the right to speak in public places is no part of the right of free speech has been strenuously urged, however, we wish to point out that it is erroneous and at variance with the decisions of this Court.

Davis v. *Massachusetts* does not stand as authority for the right of a municipality to bar all public meetings. The

ordinance there attacked did not impose any such prohibition; it merely required that permits be obtained for meetings. The opinion does indeed contain some remarks to the effect that the City of Boston might have prohibited all public meetings *on the Boston Common.* That power may also be conceded without in any way affecting the respondents' case herein. It may be (for all that appeared in the *Davis* case) that Boston Common is so situated that allowing public meetings thereon would unduly restrict traffic or interfere with the use of general recreational facilities. If that were the case, the City of Boston could prohibit use of the Common for public meetings, provided other appropriate and convenient places in the City were open to meetings. And just so, by the terms of the decree under review, Jersey City is left free to bar public meetings entirely in those places where traffic congestion or recreational needs render such meetings impracticable. "It is difficult to conceive a time when a public meeting might properly be held at Broad and Chestnut Streets in Philadelphia, or at Broadway and Forty-second Street in New York City", said the court below (4 R. 115). The Boston Common may have been in the same category when *Davis* v. *Massachusetts* was decided.

If, however, *Davis* v. *Massachusetts* can be said to have intimated that all meetings in public places might be barred, as petitioners contend, it is clearly inconsistent with the American and British tradition, and has been entirely discredited by later decisions of this Court.

The English Tradition.

In England the use of public places for speaking purposes is taken for granted. It is taken for granted despite the fact that in England there is an unwritten constitution which can be altered at will by the Parliament. For this reason the English courts have said that

the right *might be* abrogated. The fact that it has *not* been, that the English government has consistently accorded a right to speak in public places, is especially illustrative of the fundamental character of the right. Typically, licenses and permits are not and never have been required as a condition precedent to speech in the public places of Great Britain. Lord ELLENBOROUGH, in *Cobbett's Case,* 29 How. St. Trials 49 (1804), said that the law of England was a law of liberty and that consistently with such liberty, they had not what was called an *imprimatur*—a license system. In his classic *Liberty of the Press, Speech and Public Worship,* published in 1880, James Paterson wrote that "the courts never went the length of laying down the positive rule * * * that a public meeting could not be held without the license of some public functionary" (p. 19). And in 1915 A. V. Dicey, in *The Law of the Constitution* (8th ed.), indicated the freedom from previous restraint on speech in public places which is typical of England: "Any man may, therefore, say or write whatever he likes, subject to the risk of, which may be, severe punishment if he publishes any statement (either by word of mouth, in writing or in print) which he is not legally entitled to make."

Of course, the right may not be exercised at all times in all places. Highways may not be rendered useless for purposes of travel by public assemblages. *R.* v. *Carlile,* 6 C. & P. 636 (1834). Trafalgar Square, the nucleus of Metropolitan London, cannot be clogged up by a large public meeting. *Ex parte Lewis,* 21 Q. B. D. 191 (1888). Certain types of meetings may not be held within one mile of Westminster Hall. Jennings, *The Law and The Constitution* (1933), page 242. Nor may the public parks be so cluttered with public meetings that there is no space left for children to play or equestrians to ride. But the necessity that there be some adequate places where the right can be exercised has never been questioned. In 1872 a statute was passed which allocated some public park prop-

erty for this purpose. Paterson, *op. cit. supra,* page 23. And while there is no written constitutional provision requiring that space be appointed for use as a public meeting ground, actually today "there are special localities, which by statute, by custom or otherwise, are so dedicated to the use of the public as to be available for the purpose of public meetings." Dicey, *op. cit. supra,* page 498. The petitioners' contention that a municipality may cut off the right of speaking in public places entirely, is inconsistent with the growth and present custom of the English law.

The American Tradition

"The rights of free speech and free assembly are essential parts of our American heritage" (4 R. 114). Traditionally in the United States, freedom of speech means freedom to speak in public places:

> "The right of the people to meet *in public places* to discuss in an open and public manner all questions affecting their substantial welfare and to vent their grievances, to protest against oppression, economic or otherwise, and to petition for the amelioration of their condition, and to discuss the ways and means of attaining that end were rights confirmed and guaranteed them by the magna charta, petition of right, and the bill of rights, the mainstay of the British constitution and the bases of both our federal and state constitutions."
>
> *State* v. *Butterworth*, 104 N. J. L. 579, 581 (1928), *rev'g* 104 N. J. L. 43.

It is not true that the courts of this country regard the use of public places for speaking purposes as a mere privilege revocable at will. *The petitioners have not advanced one case, and it is believed that not one could be found, holding that speaking in the public places of a*

municipality may be entirely prohibited. The most extreme restraint upon the use of the public places for speaking purposes which the American courts have upheld takes the form of the ordinance involved in the *Davis* case, conditioning such use upon obtaining a permit from a specified municipal authority. Obviously, cases sustaining such ordinances do not hold that the municipality could prohibit public speaking entirely. They establish only the proposition that licenses may be required if proper criteria for their issuance are adhered to. Of such a nature are the *Davis, Atwell, Smith, Fincke* and other cases relied upon by the petitioners and discussed above.

Moreover, the right to speak in public places has become so integral a part of American democracy that many American jurisdictions struck down ordinances of the type upheld in the *Davis* case even before this Court established their unconstitutionality in the *Lovell* case. The State courts resorted to many different theories but the net result of their holdings was that even before the *Lovell* decision, the system of making public speaking dependent on uncontrolled administrative discretion, was, on the whole, in disrepute in this country.

State v. *Coleman*, 96 Conn. 190 (1921)—The ordinance is violative of sections 1 and 5 of the Connecticut Bill of Rights, which guarantee equality in rights and freedom of speech.

Anderson v. *Tedford*, 85 So. 673 (Fla., 1920)—"The ordinance is void for unreasonableness."

City of Bloomington v. *Richardson*, 38 Ill. App. 60 (1890)—An ordinance which would apply to all meetings or gatherings of any kind or for any purpose upon the public streets or public grounds of the city held not to be a rightful exercise of the police powers, but unauthorized, unreasonable and void.

Rich v. *City of Naperville*, 42 Ill. App. 222 (1891)—"* * * this ordinance is unreasonable, oppressive * * *."

City of Chicago v. *Trotter*, 136 Ill. 430, 433 (1891)—"Under the ordinance the superintendent of police has even authority to prohibit all street parades and processions whatsoever. * * * It is subversive of the liberty of the citizen and outside of the domain of the law that authority so arbitrary should be lodged in the individual."

Anderson v. *City of Wellington*, 40 Kan. 173, 178 (1888)—The ordinance "is an abridgment of the rights of the people. It represses associated effort and action. It discourages united effort to attract public attention and challenge public examination and criticism of the associated purposes. It discourages unity of feeling and expression on great public questions, economic, religious and political. It practically destroys those great public demonstrations that are the most natural product of common aims and kindred purposes."

Matter of Frasee, 63 Mich. 396, 405 (1886)—"This by-law is unreasonable * * *. It is lawful to provide for dealing with the mischief, but it is not lawful to go beyond reasonable measures and precautions in anticipating it."

State ex rel. Garrabad v. *Dering*, 84 Wisc. 585, 594-5 (1893)—"The ordinance resembles more nearly the means and instrumentalities frequently resorted to in practicing against and upon persons, societies and organizations, a petty tyranny, the result of prejudice, bigotry and intolerance, than any fair or legitimate provision in the exercise of the police power of the state to protect the public peace and safety. It is entirely un-American and in conflict with the principles of our institutions and all modern ideas of civil liberty. * * * The people do not hold rights as important and well settled as the right to assemble * * * subject to the power of any public officer to interdict or prevent them."

This list is not intended to be all inclusive. Additional cases of like purport could be cited, all typical of the democratic American view that it is part of the right of free speech to have a public place in which to speak.

Lovell case is conclusive that there is a right to use the public places for speaking purposes.

Whatever doubt may have existed before the decision in the *Lovell* case as to the right of municipalities to ban all speaking in public places has been resolved by that case against the existence of such a right.

The Lovell case held that freedom of the press meant freedom to distribute written matter in public places. Reiterating the words used by a predecessor bench in *Ex Parte Jackson,* 96 U. S. 727, the Court said (303 U. S., p. 452):

> " 'Liberty of circulating is as essential to that freedom as liberty of publishing, indeed without the circulation, the publication would be of little value.' "

The facts of the case make clear that the "circulating" adverted to was circulating in public places.

Thus in effect the *Lovell* case held that the public streets of a city must be kept open for two purposes: public passage *and* the circulation of written matter. It would follow that the functions of the public parks are likewise dual: recreation and a *locus* for the distribution of the press. Similarly, it is submitted, the streets and parks must be available for the exercise of the right of free speech. The petitioners' entire argument on this issue boils down to an erroneous assumption that public places have the solitary purposes of traffic and recreation.

If freedom of the press means freedom to distribute the written word in public places, then certainly freedom of speech must mean freedom to distribute the spoken word in the same places. It is inconceivable that this Court would draw a distinction between the two, since it has at all times viewed the guaranties of free speech and a free press as substantially identical. The use of public places is even more vital to the existence of free speech than it is

to the continuance of a free press. For literature can be distributed in other ways—by mail, for example. But often no alternatives are open to the speaker who is denied the use of public meeting places. The experience of the respondents herein with private halls reveals that they had no alternative. As was said by the Circuit Court of Appeals, "while streets and parks are to be administered primarily for the use of people for travel and recreation it is equally certain that, consistent with such uses, the public places of a city must be open for the use of the people in order that they may exercise their rights of free speech and assembly. If this were not so it is obvious that these rights would be but empty forms for those unable to obtain suitable private places in which to exercise them" (4 R. 117).

If free speech does not imply a right to speak in public places, then the right of a man to address his fellows depends entirely upon the unpredictable vagaries of private hall owners who have no responsibility or duty to the public, and who by their failure to build halls, or their disinclination to rent them, or their insistence upon exorbitant charges, could at will reduce the constitutional guaranty of free speech to a nullity. This would be especially true in the case of the poor and the underprivileged, those who are most apt to have grievances and least apt to have the funds necessary to rent a hall in which to air them. Since they are even less likely to have the capital necessary to exercise the freedom of the press also assured to them, they would often in practical effect be denied any right to communicate publicly if the petitioners' contentions are correct.

Only if free speech means a free place in which to speak, does the constitutional guaranty assume any realistic meaning. America's long history of town meetings and public assemblages should dispel any notion that a constitutional right can be made entirely dependent upon the will of a few private citizens who by chance have built halls or deal in their rental.

(d) *Even if municipalities could validly bar all speaking in public places, they could not condition such speaking upon an invalid previous restraint.*

The petitioners take the position that if a municipality can forbid speaking in public places entirely, it can condition the right to speak in such places in any way that it pleases. Even "an arbitrary application [sic] of such [public speaking] ordinances cannot be complained of by individuals since the greater power of absolute and proprietary control contains the lesser, of arbitrary or discriminatory application [sic]" (Brief in Support of Petition for a Writ of Certiorari, p. 17). We have already shown that the major premise of this argument is erroneous; that there *is* a constitutional right to speak in public places. But even if the major premise were correct, the conclusion would not follow. Whatever the law as to the right to speak in public places, a City cannot condition permission to speak upon a standard clearly void as a previous restraint.

Assuming *arguendo* that a municipality could ban *all* public meetings, then on petitioners' theory it could do any "lesser" thing—it could ban meetings of persons having red hair, for example, or meetings of Italians, or meetings of lawyers. Similarly, on the petitioners' theory, it would follow from the municipality's plenary control over the public highways that it could close those highways to traffic altogether, or close them between 1 and 2 P. M., or exact confiscatory tolls for the privilege of using them, etc.

Thus the petitioners seek to smuggle in through the back door of this "greater-lesser power" theory a regulation which they could not impose directly without colliding with the Fourteenth Amendment. Similar attempts in the past have consistently met with defeat at the hands of this Court. See for example, *Frost* v. *Railroad Commis-*

sion, 271 U. S. 583 (1926).* There as here, the use of the public highways was at issue. A California Act granted permission to use the highways to private carriers only if they complied with certain conditions which in effect would have converted them into public carriers. The State argued, along the lines here urged by the petitioners, and the highest state court held the act constitutional on the ground "that the state had the power to grant or altogether withhold from its citizens, the privilege of using its public highways for the purpose of transacting private business thereon; and that therefore the legislature might grant the right on such conditions as it saw fit to impose" (p. 591). This Court, while agreeing that the use of the public highways for private profit was a privilege that might be entirely withdrawn, held that it nevertheless could not be granted subject to an invalid criterion, and reversed, saying:

> "We hold that the act under review, as applied by the court below, violates the rights of the plaintiffs in error as guaranteed by the due process clause of the 14th Amendment; and that the privilege of using the public highways of California in the performance of their contract is not and cannot be affected by the *unconstitutional condition* imposed" (p. 599).

Similar reasoning would apply here if the petitioners were correct in their view that a right to speak in public places is no part of the right of free speech. Permission to speak being conditioned by the ordinance upon an invalid criterion, namely anticipation of disorder, it is immaterial whether Jersey City could bar meetings in public places entirely. In any event, the standard carried by the ordinance is a previous restraint upon freedom of speech, and as such unconstitutional.

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* To the same effect, see, *e. g., Hanover F. Ins. Co.* v. *Carr,* 272 U. S. 494 (1926); *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490 (1927); *Foster Fountain Packing Co.* v. *Haydel,* 278 U. S. 1 (1928); *Phillips Petroleum Co.* v. *Jenkins,* 297 U. S. 629 (1936).

B. Viewed even as a general police regulation (as distinguished from a previous restraint prohibited under any circumstances), the ordinance is void because unreasonable in the light of the underlying facts.

We have shown in A above that the standard of anticipated disorder renders the ordinance void as a previous restraint, whatever the facts or circumstances to which it is sought to be applied. But even if the ordinance is viewed not as a previous restraint incapable of validation by any factual background, but as an ordinary police power regulation and so to be judged, it is still void. For the constitutionality of police regulations is dependent upon their "reasonableness" and it is in this connection that this Court has laid down a factual test. "Underlying questions of fact may condition the constitutionality of legislation." *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257 (1931). The underlying facts in this instance not only demonstrate the lack of necessity for conditioning the right to speak in public places upon prevision of disorder; they affirmatively demonstrate that there is no such necessity.

The notion of "due process of law" as a substantive guaranty embodied in the Fourteenth Amendment is a relative one. Substantive due process means a balancing of conflicting rights which is reasonable in the light of the underlying facts.

Here the right of free speech—said by Mr. Justice CARDOZO to be "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko* v. *Connecticut, supra*)—is said to conflict with the right of the public to be free of disturbance and disorder, and the conflict is said to necessitate the denial of all right to speak in public places when disorder is anticipated.

Yet no facts were adduced before the District Court to show the barest excuse, much less a necessity, for such a

denial. On the contrary all of the evidence indicates that Jersey City is not different from any other community in the United States; its residents are law-abiding and had for years heard minority views expounded within the City limits without "riots, disturbances, or disorderly assemblage". As a matter of fact, the petitioners boast of the peace and quietness of their city (R. 1322-31, 1570-1). The past experience in Jersey City fails, therefore, to demonstrate any need for a municipal regulation in the restrictive form adopted. There is every reason to believe that the petitioners' police force is entirely adequate to quell any disturbance which might arise.

The District Court correctly held that the constitutional alternative to suppression was adequate police protection, and the Circuit Court affirmed, saying: "The function of the police at public meetings is not to prevent speakers from presenting their views but to preserve order while they speak. Otherwise, freedom of speech and assembly is destroyed" (4 R. 115).

And country-wide experience both here and in England similarly indicates that public places have been a forum for debate time out of mind, that disorder in public places occasioned by popular revulsion against the expression of minority views is fortunately a phenomenon so sporadic and infrequent as to be negligible. As Judge Biggs pointed out:

> "In New York and London, cities possessing populations as diverse as Jersey City, free speech and free assembly are allowed as a matter of course and speakers may there call even for the destruction of existing laws and governments and be received with tolerance and amusement" (4 R. 114).

If the thousands of other metropolises in this nation can manage to maintain public order without such ordinances as the one here in question, no reason appears why Jersey City cannot do the same. The ordinance lacks "the

sanction of general assent and practical experience" (minority opinion in *O'Gorman* case, *supra*, p. 70). Indeed the history of free speech joins with reason in teaching that true freedom of speech is a safety valve which *prevents the outbreak of violence* by canalizing resentment into channels of the spoken word rather than the deed.*

There is, then, an utter absence of factual justification for the kind of condition here imposed. In the absence of such a factual basis the standard must be held to be "unreasonable", and, by the same token, void. It rests on no "rational basis consistent with constitutional right." *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194 (1934). Operating as it does on a factual background which rebuts the necessity for its existence, it serves only to enable police officers to work out an area of suppression which coincides with their own prejudices.

If it could be said that some facts exist which might conceivably justify a criterion for the issuance of permits designed to preserve the public peace, we should still have to answer the question whether the interest of the public in the maintenance of public order is so vitally challenged by meetings in public places as to justify a limitation on the latter in aid of the former. In this connection the concurring opinion of Mr. Justice BRANDEIS in *Whitney* v. *California*, 274 U. S. 357 (1927) (HOLMES, *J.*, with him), is of paramount significance. Mr. Justice BRANDEIS there considered the constitutionality of a statute imposing *subsequent punishment*. Weighing the relative public interests in free speech on the one hand and maintenance of peace and good order on the other, the Justice held that it is only an "emergency" or "serious injury to the state" (organized society), which can serve to justify *even subsequent punishment* for exercise of the right of speech. Obviously what cannot be made the basis for

* Thomas Jefferson said: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors. * * *." Quoted by C. A. Beard, 123 The Nation, p. 8.

punishment after a person has spoken, cannot be a valid ground for prohibiting him to speak. The Court's attention is invited to the quoted portion of Mr. Justice BRANDEIS' opinion (pp. 376-8) as typical of what this Court has repeatedly held:

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated. * * * Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is, therefore, always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

> "Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. * * * The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state. Among freemen, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly."

Both the District Court and the Circuit Court have found a complete lack of basis for the belief that disorder was reasonably to be anticipated if the plaintiffs were permitted to speak in Jersey City, or more generally, if the expression of minority views were permitted in Jersey City. *A fortiori* there was no evidence of a "fear of serious injury", or "reasonable ground to fear that serious evil will result", that "the danger apprehended is imminent", that "the evil to be prevented is a serious one"—in a word, that there was "*an emergency*" which might conceivably justify "repression".

And so, even if the standard of anticipated disorder did not render the ordinance a prohibited previous restraint, it would be void by application of that factual test of necessity to which all police regulations must conform under the Fourteenth Amendment.

"Believing in the power of reason as applied through public discussion," the framers of the Constitution "eschewed silence coerced by law—the argument of force in its worst form." BRANDEIS, *J.*, in *Whitney* v. *Califor-*

nia, supra, pp. 375-6. The condition prescribed by the Jersey City ordinance is "the argument of force in its worst form"—indefensible under the Constitution, and both lower courts rightly held that it could not be applied to gag the respondents.

C. The ordinance has been applied to the respondents in an arbitrary, unreasonable, discriminatory, and therefore unconstitutional manner.

The foregoing supports the holding of the courts below that the standard of anticipated disorder carried in the ordinance is invalid on its face. The courts below also held that the ordinance, whether or not the standard prescribed is valid on its face, had been applied to the respondents in an arbitrary, unreasonable and discriminatory manner. This latter holding, based on detailed findings made by the District Court (Findings E-1-7; Conclusion 6) and confirmed by the Circuit Court of Appeals (4 R. 117-9) is sufficient in and of itself to ground the injunctive provisions now under consideration. Although respondents might well rest on the concurrent findings without more, they shall show briefly by reference to the record that the findings are sound; that disorder could not reasonably have been anticipated either from the proposed speakers or from the audience; that petitioners are themselves chargeable with having inspired, fomented and even subsidized the manifestations of "protest" upon which they purport to have acted in denying permits; that the whole course of official action has been instinct with dishonesty and discrimination; and that the true ground of denial of permits was nothing more than petitioners' opposition to the social, political or economic views supposed to be entertained by the respondents, and the petitioners' fear that their political dictatorship would be undermined.

1. *There Was No Reasonable Apprehension of Violence or Provocative Behavior on the Part of the Applicants for Meetings.*

> **"We can find no competent evidence from the record before us that violence or disorder would have resulted either from the meetings which the [respondents] desired to hold or from the words which the speakers were likely to deliver at such meetings"** (Opinion of Circuit Court of Appeals, 4 R. 117).

a. *Speakers' past experience on the speaking platform.* —The Director of Public Safety, when asked whether he considered the past performance of a particular speaker in weighing the question of granting a permit, responded, as if it was a new idea but a good one, that he did (R. 560-1). But in point of fact he made no such investigation of Representative Maverick (except to admit that Maverick spoke at a hall meeting in Jersey City and there was no disorder) (R. 561); nor of Representative Allen (R. 561-2); nor of Representative O'Connell (R. 562, 838-40); nor of Morris Ernst* (R. 564)—these constituting the whole roster of speakers applied for by A. C. L. U.

As to the speakers mentioned in the several applications for permits other than A. C. L. U., there is likewise no testimony that an investigation of past experience was made.† The findings that there was "no competent proof" that any of the speakers had ever given reasonable grounds for belief that breach of the peace would result from his utterances (E-4-6) are plainly correct.

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* On cross examination Casey's recollection was refreshed to the extent of recalling a press report of a speech made by Ernst in Washington on or about December 17, 1937. It is obvious, however—as Casey in effect admitted—that this could not have affected his decision on the A. C. L. U. application (R. 824-31, 854-5; Exh. D-1).

† On cross examination Mayor Hague testified that he believed Roger N. Baldwin (one of the proposed speakers named in the C. I. O. application) had "transcended the bounds of free speech" in his remarks before the Fish Committee in 1931 (R. 1480). There is no evidence that Mr. Baldwin's statement (Exh. D-27) resulted in disorder when it was made; it will be seen on inspection to be a mere statement of the "clear and present danger" rule as enunciated several times by this Court; and could certainly not form a rational basis for denying Mr. Baldwin the right to speak seven years after the event.

b. *Identity and affiliations of applicants.*—Director Casey at one point observed that he considers "names". Thus (R. 545):

> "Q. Do you pay attention to the applications that come in, *to the names of the persons who are to speak?* A. *Yes, I do.* I look it over.
> "Q. *That is important?* A. *Yes, very much.*"

When pressed, however, Casey lost his assurance. Sometimes he investigates the speaker; sometimes he gets in touch with the speaker and asks questions; but he does not remember a single case where he did so before the present difficulty (R. 544-5). Indeed, as to certain meetings he finally concedes—neatly contradicting himself—that the names of speakers are quite unimportant (R. 548-9). Certainly the name of the speaker was unimportant (*i. e.*, favorable to the applicant) in the case of the Whig-Cliosophic application for Senator Borah (R. 592-3); in that case it was the "auspices" that controlled (R. 637-8; 593-5). But, considering cases of protests against speakers sponsored by the Socialist party on the one hand and by the Republican party on the other (in the first case he would deny the permit, in the second he would grant it), "It is not the party, *it is the man, the individual,* Counsellor, that is going to talk, that is going to cause the trouble. Q. That is the real pivot? A. That is the real issue. and I guess you are aware of it" (R. 637). Thus a second contradiction.

The theory of "names" to one side—since theory is obviously not the Director's strong point—in practice Casey does animadvert on the proposed *affiliations* of speakers in denying applications made on their behalf. In denying a permit, he spreads himself on Representative O'Connell's tour of Spain, allegedly as the guest of the Communist party (Exh. P-31). Similar comments are contained in other letters of denial. Mayor Hague, of

course, stressed throughout the alleged connections of persons and organizations who applied for permits with a melange of persons and organizations deemed by him to be subversive. Both presumably derived their information from newspapers, which they read "between the lines" (R. 563).

It has been noted that the only support for the claim of "subversiveness" came in the form of newspaper clippings and the like (Exhs. D-9-11, 14, 16-27) introduced on petitioners' cross examination and admitted solely as furnishing the alleged basis for the petitioners' state of mind (R. 1416, 1429, 1433, 1590 ff). It need merely be said that the exhibits—a carefully selected set of calumnies much of which does not even have a verbal connection with these respondents—are, as the District Court said, hearsay "not single but triple" (R. 131). The concurrent findings clear the respondents of any charge of subversiveness (B-4-5).

c. *What the speakers proposed to say.*—At several points, the petitioners indicated that they feared disorder might be occasioned by the substance of the proposed speakers' remarks, thus disregarding the peaceful past history of the speakers and their sponsors. Director Casey believed, he said, that "The applicant by his talk can create a disturbance" (R. 560), and he agreed that "in advance of what * * * speakers might say you have to come to the conclusion as to whether their words might create what you call mob disorder" (R. 620). Casey has, however, "no rules and regulations" governing permissible subjects of discourse (R. 567). He says he never asks a speaker to specify in advance what he proposes to talk about; indeed, he claims no such power under the ordinance (R. 554). But in connection with at least one application—A. C. L. U.—Casey did enter into a prolonged debate with the applicant as to the subject mat-

ter of the proposed meeting and as to the existence of civil liberties in Jersey City* (R. 32-33, 35-7, 555-7, 564-7).

From the welter of contradictory statements by Casey it is not clear what he really thinks on this subject; it is enough to say, however, that the defense nowhere asserted that the stated subjects of the meetings in question were in any respect improper; and Casey himself finally conceded that he did not deny the applications on the basis of provocative subject matter (R. 569).

d. *The exploded theory of "invasion".*—Similarly ineffectual was the attempt to magnify and exploit the episode of November 29 as an indication that these plaintiffs were, in the language of the answer, engaged in an attempt "to intimidate the police and authorities of the City of Jersey City and to create disorder, confusion and riot" (R. 59).

There is much talk in the record of an alleged threat of "invasion" by respondent Carney, regional organizer for C. I. O. It may be enough to say that such a threat, even if made, would have been an act of the C. I. O. and no one else—it could have no reference to A. C. L. U. or the several other organizations whose applications for public meeting permits were denied; that the applications for A. C. L. U. and C. I. O. were denied a month after the alleged threat, and the applications of the various other organizations were denied as much as five months after the alleged threat.

The strongest answers to the theory of "invasion," however, are that the City authorities had no real basis for believing that such a threat had been made; and that the threat, even if made, did not materialize. The Mayor admitted that the first report of a threatened "invasion"

* Casey wrote in part (Dec. 22): "You informed me * * * that the purpose of the meeting is to petition the Mayor and other responsible officials for the expression of free speech, free press and other civil liberties. Since these rights and the other civil liberties you refer to prevail fully in Jersey City, will you please let me know in what manner you consider them infringed, restricted or violated."

by Carney appeared in the Newark Sunday Call of November 21, 1937 (R. 1338-40; see R. 1450). The text of that article contains no threat of invasion or disorder (Exh. P-40; R. 1341). The headline did indeed mention "invasion"; but it is evident to anyone who reads the article, and must have been evident to the Mayor and Casey, that this was pure fancy on the part of the headline writer, since it found no basis in the story itself. The later newspaper reports appearing in the Bergen Record,* Newark Evening News (Exh. D-15), Hudson Dispatch and Jersey Journal, all published on dates later than November 21 (R. 790, 553, 1447-8, 1450-1) are variants or rehashes of the original item in the Sunday Call; besides, they are mutually contradictory, one mentioning 3,000 intending distributors, another 2,000, and so on.

The credence which the Mayor and Casey say they gave to the more lurid reports of the "invasion" contrasts strangely with their skepticism toward newspaper reports in general, and particularly toward newspaper reports reflecting unfavorably upon themselves. Thus Casey says, referring to a printed statement purporting to have been made by himself, "I know it was a darned lie, for I never interviewed the man, or he never interviewed me" (R. 851, 786-7); and, "My gosh, you hear a lot of stuff" (R. 851). The Mayor complained bitterly that the press had misrepresented him, especially in respect of the notorious "I am the law" (R. 1235-7). Still Casey and Hague believed—or said they believed—what they read in certain newspapers about Carney's threat of "invasion", pyramided upon a newspaper report which was admittedly innocent. They concededly made no effort whatever to communicate with Carney himself (R. 554, 1040).

Whether or not the officials had reasonable ground for apprehending an "invasion" on November 29, it is impos-

* Until reminded of the article in the Newark Sunday Call, Hague stated that the report in the Bergen Record was the first; that a shorthand report had been taken of Carney's declaration (R. 1097-8). The stenographer was not produced.

sible to believe that that apprehension could carry over to the denial of permits a month and more later, since the "invasion" turned out to be nothing of the kind. The Mayor, who decides such questions as "invasion" (R. 1096-7) defined that phenomenon as ten or more men "armed to the teeth, to destroy life and property" (R. 1040; see R. 1037-42). He conceded that no such thing occurred on November 29. "No, he [Carney] was afraid to" (R. 1040, 1100, *et circa*). Moreover, all of the credible evidence indicates—and the defense made no effort to refute it—that the episode of November 29 was wholly peaceful so far as the distributors were concerned; it was an orderly test of an ordinance which could not otherwise be tested, and which was in fact unconstitutional. This dud of an "invasion"—sired by the imagination of a headline writer and never emerging in fact—was simply seized upon by the City officials as a convenient excuse for the police exhibition of November 29 and for the official course of conduct to the date of the trial.*

The conclusion is inescapable, on the basis of all the foregoing, that the officials had no reasonable ground for believing—and in fact did not honestly believe—that the applicants for public meetings would have created riot or disorder by what they would have said or done had the permits been granted. Indeed petitioners do not now contend that disorder was threatened or believed to be threatened on the part of the applicants.

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* Judge DAVIS' reliance in his opinion on the "invasion" reports (4 R. 157-8) takes no account of any of the factors above set forth.

2. *There Was No Reasonable Apprehension That Those Who Chose to Attend the Meetings Would Have Created Riot.*

> **"Nor was there any reasonable apprehension that the public in Jersey City would have rioted"** (4 R. 117).

Being unable to support the position that the permits could properly have been denied by reference to possible incendiary gestures by the proposed speakers, the petitioners executed a *volte face* and said that what they really feared was violence on the part of those residents of Jersey City who might choose to attend the meetings (*be it noted that there is no compulsion on any citizen to show up*). Casey says he was disturbed by the temper of the people as manifested by letters or resolutions of protests lodged with him, by the "patriotic" meetings held in the City, and the like. Thus Casey (R. 569):

> "Q. So you denied the permit without any regard to what the speakers would say, *and solely because of the protest?* A. The protest, yes."

a. *"Protests": letters and resolutions.*—The proposition that protests were used as a significant index of possible riot may be tested by reference to the A. C. L. U. and C. I. O. applications. Both of these applications were denied or in effect denied by December 30, 1937. It is more than fair to the City, then, to consider the protests which reached Director Casey's office up to and including January 1, 1938.

By omitting date references in their so-called "Statement of the Case", the petitioners have attempted to cover up the following facts: Not more than fifteen letters or resolutions of protest were received by Casey on or before January 1.* Of these not more than six (lib-

* "Barrels" of protests promised by counsel for the petitioners did not materialize.

erally construed) as much as mentioned A. C. L. U. or C. I. O. These six are resolutions or letters from the Jersey City Real Estate Board dated December 14 (R. 821-2) and December 30 (R. 685); the Community Center, December 30 (R. 685-6); Italian War Veterans, December 29 (R. 686); Hudson County Post No. 2, undated (R. 687); a veterans' meeting, December 28 (R. 39). Not a single protest referred to in the entire record threatens violence by anyone; but one protest (veterans' meeting, December 28) predicts that there may be violence, presumably on the part of other people. The protests are merely couched in terms of opposition to subversive ideas. Certainly it is a gratuitous insult to the organizations above-named to suppose that they would be so unmannerly, not to say lawless, as to break up any meeting.

We need hardly pause to note that Casey, although apparently placing great emphasis on the protests, simply noted their arrival and filed them (R. 638-9); "at times," he says, he investigates protests to check on their authenticity, but he cannot name a single instance where he did so (R. 639); "at times" he inquires to see whether the address given is a *bona fide* address, but he cannot name one instance where he so inquired (*id.*); he is not interested in the form of the protest as an index of its value (R. 640, 683-4); he is utterly unconcerned with the genuineness of signatures, duplications, *etc.* (R. 694-7, 699).

A more striking fact is that there is no evidence of any protest specifically lodged against several of the meetings other than A. C. L. U. or C. I. O. for which permits were denied in the period from December, 1937 to June, 1938.

And plainly, if the theory was adopted that a half dozen protests against a particular meeting are proof of prospective violence and justify the denial of a permit, no one could speak anywhere in the United States—the writing of letters and the adoption of resolutions being inveterate habits of the American people. More than six protests could be gathered at any given time against the

appearance in public of any man including Justices of this Court (see R. 570-1). Petitioners are not so naive as to be unaware of this. With commendable frankness, therefore, they admitted that protests would be disregarded if they were lodged against Republicans (R. 637-8), the Chamber of Commerce (R. 1363), or other "high class" organizations. There was, moreover, a peculiar lack of responsiveness when the question was asked whether protests would be considered if Mayor Hague applied for a permit (R. 558).

b. *"Protests": the veterans' meeting.*—Stress was laid by the defense on the meeting of veterans which occurred on December 28 and resulted in the resolution of protest to which reference has been made (R. 39).* Although the protest did not in itself threaten violence, it predicted that violence might occur. Casey, in denying the C. I. O. application under date of December 30, said in part (R. 38-39):

> "On the evening of December 28, 1937, a great mass meeting was held in the Armory at Jersey City, attended by over three thousand persons, all of whom were veterans. At that meeting, a resolution of opposition was passed against the granting of the permit. Violent disorder was threatened on the part of the veterans in case the meeting was held. Announcements were made from the floor—and these announcements had the approval of the meeting—that if I should refuse to honor the Veterans' protest and grant a permit for the meeting, the veterans would take the matter into their own hands and see to it that the meeting would be broken up. I refer you to copies of the local papers of Jersey City, which give an account of this meeting. I also enclose a copy of the resolution passed by the Veterans at the meeting."

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*The veterans' meeting of December 28 was the only one which could have affected the consideration of the A. C. L. U. or C. I. O. applications. The rest occurred after January 1, 1938.

But the tendentious "announcements from the floor" boil down merely to the threat of one Brophy that the veterans would apply rubber hose in the event the application of A. C. L. U. or C. I. O. was granted (R. 658, 724, 1093). On hearing the threat Casey caused an investigation to be made by the Chief of Police (R. 658-9, 725) and himself issued a statement to the press critical of Brophy (R. 1094, 1118). The Chief of Police reported that Brophy "was saying what he didn't mean" (R. 658), and that it was "just an idle jest" (R. 725). Mayor Hague was also of the opinion that it was "a joke"; "That is a statement, as I assume, from a man who is enthused, a little bit more enthusiastic than the average man, and they make statements like that. They don't ever amount to anything, Counselor" (R. 1094). So much for the Brophy threat.

Both Casey and Hague were closely questioned as to whether the leaders of the veterans would themselves engage in violence. Both rejected this supposition—Hague with some heat—on the ground that these gentlemen are "law abiding citizens" and "leaders of public opinion" (R. 1306, 1307). As a matter of fact, Hague pointed out with just pride that the veterans did not appear in Journal Square on May 7 or May 27 (O'Connell) with rubber hose (R. 1094). Finally, *Hague flatly conceded that he never anticipated any disorder from the veterans* (R. 1093-4):

> "Q. Now, as a matter of fact, did the veterans appear that night with rubber hoses? A. I do not know, I don't think so; I wasn't there.
>
> "Q. As a matter of fact, they didn't from the newspaper report, did they? A. No, they didn't. That is a statement, as I assume, from a man who is enthused, a little bit more enthusiastic than the average man, and they make statements like that. They don't ever amount to anything, Counselor. *They don't disturb me because I never anticipated any disorder.*"

The court below properly stated upon review of the record that "Mayor Hague * * * made plain his belief that * * * there was no real danger of physical violence from the veterans' organization" (4 R. 105).

c. *Putative size of anticipated disorder.*—Even if disorder could reasonably have been anticipated, the question remains, how much? While emphasis was placed by defense counsel on the word "prevent" as it appears in the ordinance, involving, according to them, the rule that meetings might be denied if there was *any* apprehension of violence, irrespective of its size, Director Casey was more realistic. He concedes that if but two or three hoodlums showed up they could be easily quelled (R. 635-6), and that apprehension of a disturbance of that size could not be proffered as a reasonable excuse for denying a permit. Again, despite some vacillation, he is of the opinion that his forecast of whether the anticipated disorder will be so large as to be uncontrollable, or so small as to be controllable, is an important factor in deciding whether a permit should be granted (R. 619-27, esp. 627). While mob psychology is a "funny thing" (R. 616), he is constrained to admit that he must decide whether "a lot of police" or few police would be needed to maintain order (R. 609-17) and would rule on a permit accordingly.

It is impossible to believe, on the basis of the record facts above analyzed, that any disturbance not preventable by a simple admonition of Director Casey or Mayor Hague or, at worst, an appropriate show of force, would have occurred had the A. C. L. U. or C. I. O. application been granted. And the court below expressly found, "It in no wise appears * * * that the police of Jersey City would have been powerless to maintain order at any meeting proposed by the [respondents]" (4 R. 106). This conclusion is reinforced by Casey's admission that there has not been a single arrest for disturbing a meeting in Jersey City during the past year (disorderly conduct)

(R. 700), and by his expressed confidence in the police (R. 620); by Hague's boast that Jersey City is a law-abiding community with a low crime record (R. 1322-31, 1570-1); and by the past experience of Jersey City with meetings at which minority views were expressed (R. 1117, 1121-2, 1124, 1134, 1364-5).*

The conclusion is clear as to the A. C. L. U. and C. I. O.; it is clear beyond possibility of doubt as to other meetings for which permits were denied during the period in question, such as the Catholic Workers, the Whig-Cliosophic Society of Princeton, the Independent Speakers' Association, *etc.*

In point of fact, Hague himself was at a loss to explain the denial of the permit for Senator Borah; *the best he could do was to suggest that the application might have been denied because it was in telegraphic form* (R. 1307-15)!—although the letter denying the application gives disorder as the reason (Exh. P-16), and Casey maintained throughout that this was the sole reason for the denial (R. 616). Similarly the defense at some points became so embarrassed by the facts that it began to waver on the reason for the denial of the A. C. L. U. application (at R. 808-9 it is suggested that the reason was that the City has no jurisdiction over the court-house plaza—but the application was not so confined; at R. 819, that A. C. L. U. had not persisted in its application—pure fabrication).

3. *Official Inspiration, Fomentation and Financing of Demonstrations of "Protest".*

> "There is evidence that Mayor Hague and his associates inspired at least some of these protests. The evidence is uncontrovertible that he was the spearhead of the movement to keep the [respondent] labor groups out of Jersey City" (4 R. 105). "The cries of impending riot raised

* There is record evidence that as many as 500 policemen were summoned to patrol a particular assemblage, apparently without dislocating the police service in the city (R. 333, 888, 449; see R. 589-90, 45-6).

> by [petitioners] are not candid. In other words, Mayor Hague and his associates, reversing the usual procedure, troubled the waters in orders to fish in them" (4 R. 115). "The record, however, presents an extraordinary fact. The Mayor of Jersey City and the other [petitioners] endeavored to build up a dangerous situation, one in which the sympathizers of the [respondents] could not safely speak. That such efforts did not result in actual danger seems to us to have resulted rather from the good sense of the citizens than from the good will of Mayor Hague and his associates" (4 R. 117-8).*

It has been shown that the prospect of disorder on the part of the members of the public was a convenient myth—even if the demonstrations and letters of "protest" were *bona fide*. The picture which emerged at the trial would not fully appear to this Court, however, if the true origin of the "protests" were not appreciated. Although counsel for petitioners early in the trial denied the charge with considerable emphasis, even to the extent of agreeing that proof of the charge would be fatal to their case (R. 304, 619) it is clear beyond serious debate that the demonstrations of protest were inspired, fomented and partly subsidized by the petitioners themselves.

The Mayor frankly confessed from the witness stand that he deemed it his official duty to repel the advance of the respondents and the forces which to his mind were aligned with them; it was to this end that he "engineered" and worked "day and night" (R. 1074).

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* Judge DAVIS states in his opinion (4 R. 161) that the trial judge refused to find that petitioners "had incited or stirred up the people to protest" and that the majority of the Circuit Court of Appeals was in effect overruling the trial judge on this point in making the findings quoted in the text. The reason why the trial judge omitted to make findings on the question of fomentation is sufficiently described in the opinion of the majority of the Circuit Court of Appeals (4 R. 117): the trial judge found fully on the question whether there was any reasonable probability that the *speakers* would cause disorder; in his view that was the test, and the only test, to be applied if a previous restraint was admissible under any circumstances. Since he regarded threats of riot on the part of the audience as being no valid ground for denying a permit, he thought it unnecessary to make findings on the question of fomentation. Thus his omission to find fomentation is not an indication that he did not believe fomentation was proved.

The record is shot through with intemperate and unfounded abuse by the Mayor of the respondents and their supposed associates. His offensive gossip from the witness stand, however, pales by comparison with his public utterances during the period from late November to the time of the trial. Some of these speeches, proclamations and appeals to the public appear of record (Exhs. P-42-46); some indication of their content has been given above. It is enough to say that they were designed to rouse the rabble; if the public mind was indeed inflamed against respondents, as petitioners suggest, then the Mayor was the cause of it. In point of fact he does not deny the charge, although his counsel may; he glories in it.

It has been shown in detail that the veterans' meeting of December 28, resulting in the resolution of "protest" to which the Director of Public Safety referred in denying the C. I. C. application for a permit, was not a spontaneous affair. Not only was the voice of the veterans the voice of Hague; it spoke at the precise time deemed strategic by Hague and Casey. As to the "Important Notice" signed "Message from Mayor's Office" Hague frankly admitted that it might well have been deemed to be authentic by those who received it because the Mayor was identified with the "movement" (R. 1063):

> "No, that came from the veterans, you can see that, and they assumed that the message come from the Mayor's office because of my activities in this movement. W[illegible] they wanted to impress upon the veterans, and t[illegible]usands of them is my personal friends, *that I was interested and that this was approved by the Mayor and my associates, which we did, we approved of everything now; we are not shirking any of that.*"

The affair of December 28 discloses the astounding phenomenon of a high governmental official, charged by law with responsibility for maintaining the peace, deliberately withholding action upon an application in order to allow

time for the stimulation of a condition of prospective disorder on the basis of which the application could be denied. This is shown not only by analysis of dates and circumstances but by the best evidence possible, namely, Casey's letter of denial, which reads in part as follows (R. 38):

> "On receipt of your letter, I sent you a communication, dated December 27, 1937, in which I informed you that I would, as required by ordinance, make prompt investigation of all of the facts and circumstances pertinent to your application before deciding whether to grant or refuse the issuance of the permit requested. On the same day, December 27, 1937, I received a communication written on behalf of certain Veterans' organizations of Jersey City, protesting against the granting of a permit to Roger N. Baldwin or to any members of the group he represents, to hold a meeting. *The letter demanded that I withhold action on your application.* I attach a copy of the Veterans' letter to this communication."*

Unmistakably the same forces were at work in inspiring "protests" by other organizations; the "protests" were never more than an echo of petitioners' repeated diatribes and were the intended results of their activities.

The analysis could be supplemented by a consideration of the "patriotic" rally in the Jersey City armory held on January 6, also commented on above. Of this rally the Circuit Court of Appeals properly said: "The record indicates that the calling together of these organizations was done upon the instructions of Mayor Hague and that he himself actively collaborated in procuring the record attendance at the armory" (4 R. 105). It is, however, needless to pile on details, in the face of Hague's extraordinary admission that he personally assisted in financing the demonstrations of "protest" (R. 1359):

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*Judge DAVIS' reliance in his opinion on the veterans' resolution (4 R. 154-6) takes no account of the factors showing fomentation.

"Q. Mayor, there were various meetings and parades at the Armory, Chamber of Commerce, public square meetings, particularly those referred to in connection with the leadership of Mr. Kelly. I want to ask you whether you contributed any money whatsoever for any of those gatherings, whether for flags, billboards, notices, cards or any other of the instrumentalities used to organize the protests.

"Mr. Matthews: I object as immaterial, whether he did or not, or irrelevant.

"The Court: I will allow that.

"Mr. Matthews: Your Honor will allow an exception?

"The Court: Yes.

• • • • • • • •

"A. Offhanded I cannot just exactly say, I think I contributed, Counselor, offhanded; if you will allow me I could get you the amounts.

"Q. Would you know approximately the amounts? A. No, it is several hundred dollars, I think, more or less, not much."

To petitioners' sins of commission is added a significant sin of omission. There is every reason to believe that a word from Hague to the veterans and other groups would have caused a reversal of their supposedly bellicose attitude. He can muster the veterans for parades and other "patriotic" demonstrations without the slightest difficulty (R. 1060). His relations with civic and fraternal bodies are also intimate. There is no reason to doubt that if he whispered a word to these protestant groups they would keep the peace;* it is, moreover, admitted to be the duty of the Chief of Police to warn intending trouble-makers (R. 618-9, 653). The Mayor, however, never told these groups to behave, nor did the Chief of Police. The reason is plain. Hague did not want them to behave; he

* The Mayor conceded that Casey's statement to the press anent Brophy was sufficient to control that kind of conduct—"I imagine so" (R. 1094).

wanted, at any rate, to leave the impression that they might not behave. He was "not desirous of asking them to be less aggressive" because he felt "it was justified" (R. 1118; see R. 1060).

When the specious character of the manifestations of protest is borne in mind, the full significance of petitioners' views on the durability of protests may be appreciated. No more crushing commentary on the official policy toward free speech can be imagined than the following discussion on what we have termed the "immortality of protests" (R. 1360-1, 1362-3):

> "Q. Now, Mayor, how would an applicant, whom you term undesirable, ascertain whether or not you have come to the conclusion that the temper of the people is such that they wouldn't be offended if he came in to speak? A. Well, it is a simple matter for us to determine who would be undesirable.
>
> "Q. All right. A. From the expressions. Various civic and fraternal orders and the veterans, as they have expressed themselves in the past. *Now, I assume that if there is a protest filed with me or filed with the Director of Public Safety today, six months from now that same protest still remains until changed by those who file it.*"
>
> • • • • • • • •
>
> "The Witness: What I meant, your Honor, to the counsel's last question was that where a group of men and women—where there is an uprising in the form of a protest, if they file petitions with the governing body, that that protest about a certain condition, let us say about some condition of a gas station or some condition, we always assume, Counselor, that that protest still remains unless those folks come down and say that they have withdrawn their opposition. That is the rule of the governing body.
>
> "Q. Now, Mayor—— A. (Continuing.) The zoning condition, now we always have assumed that where a group of taxpayers have formed themselves into some society and they protest, well, now, not as

long as that society allows that protest to remain on file shall that gas station or that zoning ordinance be complied with.

"Q. And you treat the applications for the right of meetings exactly as the zoning protests? A. *That is the rule, if a thousand men or a thousand women assemble and protest about a condition we assume that that condition, that they still remain hostile without they notify us by writing; otherwise, Counselor, they would be meeting every week.*"

We conclude on this phase of the case in the words of the Circuit Court of Appeals: "The whipping up of public indignation and public clamor to the end that free expression of opinion and free assembly may not be had sets with little grace upon the officials of an American city" (4 R. 119).

4. *Outright Discrimination Apparent on the Face of the Record.*

> "While permits were refused to these persons [sponsored by respondents] * * *, other groups whose views were not at variance with the opinions of the majority of the inhabitants of Jersey City received permits freely or the requirement of a permit was waived" (4 R. 105). "Discrimination is therefore plainly shown" (4 R. 118).

Outright discrimination in the enforcement of the ordinance as to public meetings is shown on the face of the record. During the period here in question permits were uniformly denied to those groups which, by petitioners' admission, are regarded by them as "undesirable", while permits were freely granted or not required at all for meetings sponsored by groups which, again by petitioners' admission, are regarded by them as "desirable" or "high class". Thus permits were denied not only to respondents C. I. O. and A. C. L. U., but to the American Whig-Cliosophic Society of Princeton University (Senator Borah was the proposed speaker), the Catholic Workers group, the Inde-

pendent Speakers' Association, the Longo Defense Committee, the Hudson County Committee for Labor Defense and Civil Rights, the Socialist Labor Party and the Socialist Party (Norman Thomas); but permits were granted to the Jersey City Veterans Law and Order Committee (parades) and the War Mothers (parade), and the requirement was entirely waived in connection with various assemblies of veterans and others "protesting" against the very meetings that had been denied (R. 27-46, Exhs. P-16, 17, 29, 31; R. 1578-1583, 700-723, 1119). In order to credit the petitioners with good faith in the administration of the ordinance, this Court would have to indulge the hypothesis that meetings of "undesirables" (including Senator Borah) invariably threatened disorder, while meetings of "desirables" invariably betokened peace. The hypothesis is a severe strain on credulity, especially when it is remembered that the City authorities, if they are to be believed, were especially apprehensive of violence on the part of the veterans should the applications of "undesirables" be granted;—yet it was this supposedly lawless group that was not only granted permits but allowed to foregather without even having applied for permits!

The question of the waiver of permits in the case of "desirables" elicited some peculiar ratiocination by Casey and Hague. Monster meetings occurred in Journal Square and Pershing Field by prearrangement, and after announcement in the public press (see Exh. P-29),—all to the knowledge of the City officials. These meetings were called for the purpose of protesting against the appearance of certain speakers in Jersey City, although judging from the behavior of the crowd (witnesses testified that Norman Thomas was "cheered" and that the crowd's reaction to Representative O'Connell was friendly, R. 406, 444, 448-9, 962), it appears more probable that the great bulk of those who attended were there to welcome the speakers rather than to protest against them. Whatever may be the fact as to this, undoubtedly the meetings were substantial in

size. When Casey's attention was called to the fact that these assemblages were held without as much as a by-your-leave, he opined that the ordinance does not cover the case of a prearranged meeting *to protest against a speaker* (R. 700-23). Mayor Hague was of the same opinion (R. 1119). It is needless to say that no justification can be found for any such interpretation of the ordinance, and the District Court so stated (R. 721). Further, it is undenied and the witness Carrick testified that political meetings of the Democratic and Republican parties have been held in Jersey City time out of mind *without permits* (R. 453).

Plainly, the ordinance has been administered dishonestly and with gross discrimination against the respondents and organizations and persons believed to be connected with them. The concurrent findings to this effect rest on solid fact.

Judge DAVIS' view that discrimination was not shown is rebutted not only by all the record evidence here analyzed but by the significant fact that he himself concurs in the findings and holding of the rest of his court as to every substantive issue other than that of public meetings (R. 142-3). Thus he grants that petitioners discriminated against the respondents as to leaflet distribution, display of placards, etc., but insists that no like discrimination was practiced against them in connection with public meetings. We submit, with deference, that Judge DAVIS' position is implausible on its face. It is not believable that the animus against respondents which pervades the record stopped short and checked itself on the single issue of free speech. The discrimination, stemming from a single "deliberate policy", extended also to public meetings and was in fact nowhere more plainly shown than in that aspect of the case.

5. *The True Reason Why Permits Were Denied: the Applicants Are "Undesirable."*

> **"The criterion imposed by the authorities of Jersey City upon t right to speak therein is simply whether or not the individual who is to speak is a right thinking person in the view of those who constitute the city authorities. No other test is applied"** (4 R. 118).

The true reason why permits were denied to respondents A. C. L. U. and C. I. O. and the other organizations which applied during the period from December, 1937 to June, 1938, is that petitioners do not believe in free speech for "Reds"—by which they mean some wild combination of things that cannot even be approximately defined. "Riot" and "disturbance" are shams and subterfuges. The City of Jersey City has simply been engaging in a heresy-hunt.

Director Casey's real views emerge in passages like this (R. 637):

> "Q. Now, Commissioner, if two or three thousand workers in the community resent a speaker for a particular political party, let us say, the *Socialist Party,* you then denied the permit, didn't you, because you thought there might be a disturbance? A. Yes, I did.
>
> "Q. Now, let's assume that two or three thousand people sent in protests and said there would be a disturbance if the *Republican Party* had a meeting, would you treat the two situations the same or would you discriminate? A. *Now, that is a different question entirely.*
>
> "Q. Just answer, would you treat them the same? A. I would not."

Thus, Republicans and Democrats are a class apart, to which the test of protests and riot does not apply. On the other hand, Casey admits in the record that certain organizations will be denied permits for no other reason

than that he does not approve of their doctrinal positions (see R. 595). Obviously such applications as that of the American Whig-Cliosophic Society of Princeton were and could have been denied on no other ground (see Hague, R. 1307-16).

The prime heresy-hunter is, of course, the Mayor himself. Here are the Mayor's views, which could be further exemplified from his testimony under direct and cross examination, on the subject of free speech for "Reds" (R. 1133, 1149, 1367; see 1363-4; 1128-9):

> "A. *I think the Reds have no right to express their views in Jersey City* if their intention is the overthrowing of our Government and the destruction of our American Government—*no, they have no right because they are not American citizens and they are undesirables and they should be driven out of this country, not alone the city.*
>
> "Q. Or put in a concentration camp in Alaska? A. And you believe as I do, too.
>
> "Q. Thank you, Mayor."
>
> * * * * * * *
>
> "Q. You have already defined a Communist, Mayor. Now, will you tell me how an American official should handle Communists? A. Suppress them.
>
> "Q. Suppression? A. If possible.
>
> "Q. And what methods of suppression would you use? A. *Well, just as we are suppressing them in this case, we are denying them the right to hold public gatherings because of the dangers of violence and bloodshed.*"
>
> * * * * * * *
>
> "Q. [Has a man the right] To urge the complete rewriting of the Constitution of the United States? Hasn't he got that right? * * * A. Certainly, they have a right to urge complete——
>
> "Q. Rewriting of the Constitution? A. (Continuing.): —rewriting of the Constitution, but *it depends, Counselor, who these people are. If they were high class citizens and they met in peaceful*

orderly manner, why certainly they have perfect rights; but if prior to that they were advocating the overthrow of the government, they were dissatisfied with everything that America offered to them, why of course I don't assume they have any rights.

"Q. You don't? All right. A. Because they are dissatisfied with the form, to begin with.

"Q. And you don't think that they have the right to urge peacefully the change in the form of government? A. They have no right providing there is opposition and providing there is a great uprising against that type of preaching."

Since the Mayor "don't assume they ['Reds'] have any rights" (R. 1367), it becomes interesting—even if supererogative for purposes of this case—to probe into the Mayor's definition of "Reds". On this point the confusion in the record reflects the confusion of the Mayor's mind: Thus: the Anarchists are Communists (R. 1256), the Socialists are Communists (R. 1257), the C. I. O. "movement" is Communist (R. 1079, 1050), A. C. L. U. is Communist (R. 1121). The Communists are "Reds" and *vice versa* (R. 1121). Various ill assorted people are "Communists", "undesirable", "objectionable" or "improper". Thus all the heads of C. I. O., with the notable exception of John L. Lewis, are "undesirable" (R. 1353-5, 1050). Speakers for whom application was made by C. I. O. are "objectionable": this applies to Representative O'Connell (R. 1115, 1078), Roger N. Baldwin (R. 1115), and respondents Carney (*id.*) and Macri (*id.*). Representative Bernard is not a "proper man" (R. 1078). The list of hereties could be extended *ad nauseam.* It seems to include the National Rededicationists (R. 1231). It includes also all people who talk about civil rights; they are invariably "Reds" (R. 1146):

"Q. I see. But you don't believe much in these civil rights do you? A. Not coming from an element of that character. Whenever I hear a discus-

sion about civil rights and the rights of free speech and the rights of the Constitution, always remember you will find him with a Russian flag under his coat; you never miss."

And on the other hand we have the list of the faithful—the "high class", "proper", "respectable" (all particularly so if they reside in Jersey City).

The important thing to observe is that all those who are identified as "Reds" or "undesirables" may not speak in Jersey City, and this for no other reason than that they are so identified. This emerges with entire clarity in the following passage anent A. C. L. U. (R. 1267-70):

"Q. Mr. Mayor, do I understand from you that the American Civil Liberties Union is an undesirable organization, to use your words? A. Yes, sir.

"Q. And when you say it is an undesirable organization, do you mean only its directors, or do you mean its members? A. I mean the heads of it. You are one of them.

"Q. The heads of it. Now, does this mean, Mayor, in your judgment, that if the American Civil Liberties Union applies for a permit, they would be so undesirable that no one of its directors would be allowed to speak in Jersey City? A. Not according to the testimony before the Fish Committee of Mr. Baldwin.

"Q. Not according to your own judgment also? A. My own judgment, they would not be entitled.

[Here counsel read a list of members of the National Committee of A. C. L. U. as of December, 1937: Edgar Blake; Richard C. Cabot; John F. Finerty; Lloyd K. Garrison; Francis J. Gorman; Hubert C. Herring; Sidney Howard; Frederic C. Howe; Henry T. Hunt; John A. Lapp; James H. Maurer; Edward L. Parsons; Jeanette Rankin; Clarence R. Skinner; Charney B. Vladeck; A. F. Whitney; L. Hollingsworth Wood; Mary E. Woolley; Richard S. Childs; Dorothy Kenyon; Elmer Rice; William B. Spofford.]

* * * * * * *

"Q. You have heard that list of names, and I now ask you whether, having heard that list of names, consisting of members of the Board of Directors and the Executive Committee, the National Executive Committee, whether you wish to change your testimony as to the fact that those names are unacceptable as speakers in Jersey City, under an application filed by the American Civil Liberties Union? Do you want to change your statement? A. Do I want to change my statement?

"Q. Yes. A. No."

By parity of reasoning the Mayor will not countenance a May Day parade solely because "they have no place there in the beginning" (R. 1148). And so the Mayor's position as to street meetings and parades dovetails with his views as to circular distribution, administration of the placard ordinance, etc.—all of which are, as we have shown above, governed by a rule of "Redness".

We repeat here that despite petitioners' hysterical denunciation of respondents as "Reds", the concurrent findings flatly contradict the charge, so far as so nebulous a charge can be contradicted (*i. e.*, in terms of advocacy of overthrow of organized government and violation of law). By this we do not mean to concede that proof of "Redness" would be relevant to the issues. For there is no warrant under the Constitution for denying human beings the common liberties of man because their views are minority views or are disapproved by a City administration.

6. *The Ordinance Has Been So Applied to and Enforced Against the Respondents as to Violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.*

The story just told of the application of the ordinance to the respondents plainly shows corrupt, unreasonable, discriminatory, and therefore unconstitutional enforcement of the ordinance, sufficient to support the injunctive

provisions under review irrespective of the basic invalidity of the standard in terms embodied in the ordinance. Such was the concurrent finding below. The ordinance has been applied to deny respondents the right to speak, although no reasonable apprehension of disorder existed, and solely upon the ground (not authorized by the ordinance or the Constitution) that the respondents are deemed "undesirable" by the City authorities.

The criterion of "'desirability" cannot be resorted to in a democracy:

> "The long road that men have had to come from ignorance and superstition, though once beset by the hosts of intolerance and bigotry, is not now so beset, at least in America. Freedom of thought, the right of men to sincerely think and believe what they will, and to honestly disseminate that belief, is guaranteed in the bills of rights and in the spirit of the laws, beyond the power of any government official to prevent its dissemination, because the particular brand of belief, as belief, is objectionable to or not understandable by him."
>
> HUTCHESON, *J.*, in *Rood* v. *Goodman*, 83 F. (2d) 28, 31 (C. C. A. 5th, 1936).

> "The mayor refuses a permit, it is said, because the applicants were Socialists. If that is so, he was guilty of a grave abuse of power."
>
> CARDOZO, *J.*, in *People ex rel. Doyle* v. *Atwell*, 232 N. Y. 96, 103 (1921).

That an ordinance constitutional upon its face may be so *applied* by its administrators as to violate the Fourteenth Amendment, is settled by multitudinous authorities (*Yick Wo* v. *Hopkins*, 118 U. S. 356 [1886]; *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U. S. 350, 352 [1918]—MCREYNOLDS, *J.*; *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535, 545 [1934]—VAN DEVANTER, *J.*), and is a doctrine pertinent in the field of free speech as elsewhere (*Sullivan* v. *Shaw*, 6 F. Supp. 112 [D. Calif. 1934]; *People ex rel. Doyle* v. *Atwell*, *supra*).

PART TWO:

OBJECTIONS TO JURISDICTION REFUTED

POINT I

The courts below had jurisdiction over the subject matter of the case.

Representations Made by Petitioners At the Trial

The objections to jurisdiction which are now urged by petitioners will appear to this Court to be no more than the recent fruit of a lively realization that their defenses on the merits are unsubstantial.

In the trial court the petitioners represented that they could in good faith agree that facts basic to jurisdiction were present, sufficient to ground a consent decree on most of the issues in the case.

At the opening of the trial counsel for petitioners reviewed the complaint and the several prayers, and indicated that petitioners would consent to a decree on all issues except that of public meetings, as to which counsel requested a continuance in order to ascertain whether it could not be submitted to the court upon an agreed statement of facts and briefs. Judge CLARK interpreted the offer to mean: "* * * Mr. Hamill conceded the legal validity of five points * * * and agreed to an order covering those five points; * * * he did not concede the legal validity of the 6th point, namely, the question of public meetings" (4 R. 91). When counsel for respondents opposed a continuance on the ground that petitioners were not offering to consent to the factual findings to which respondents were entitled, counsel for petitioners declared that "of course we have to admit that sufficient facts are

true to base an order complying with the prayer" (4 R. 92), and "there will be no difficulty whatsoever in arriving at an agreement upon the facts, sufficient to sustain and justify a proper injunction in this case" upon all of the issues except that of public meetings (4 R. 97). He thereupon renewed his proposal to consent to a decree. A decree was in fact drawn to the satisfaction of counsel on both sides but it was disapproved by petitioners and the trial was resumed.

The least that can be said of petitioners' remarks at the opening is that they conceded that *jurisdictional amount could be stipulated to in good faith.* It might well be held that such a concession had the effect of casting the burden on the petitioners to overcome the respondents' allegation of amount contained in the bill of complaint. See *Wisconsin E. Co.* v. *Dumore Co.*, 35 F. (2d) 555 (C. C. A. 6th), *cert. dism.*, 282 U. S. 813 (1931). That a party may be bound by statements of counsel made at the opening of trial is, of course, too clear for extended argument. See *Oscanyan* v. *Winchester Arms Co.*, 103 U. S. 261 (1880); *Waldron* v. *Waldron*, 156 U. S. 361 (1894); *Turner* v. *Turner*, 16 How. 14 (1853). It is settled law that absence of jurisdictional amount must appear with utmost clarity before jurisdiction will be held not to exist; plainly petitioners are in no happy position to make any such argument in view of their statements at the opening.

The situation is concededly novel, but there appears to be no plausible reason why a representation that jurisdictional amount is present to such an extent that a consent decree would not be a sham attempt to foist jurisdiction upon the court, should not be held to shift the burden of going forward to disprove jurisdictional amount on the party that makes the representation.

In this Court petitioners say that they are earnestly interested in having the substantive questions conclusively decided, but present their jurisdictional objections as a

matter of "duty" (Br., p. 25). This Court may well relieve petitioners of this apparently onerous burden of conscience by giving the effect above indicated to their own representations made at the outset of the trial.

The objections to jurisdiction, however, are in any event without merit and were correctly disposed of by both lower courts. Not only was jurisdiction present under sections of the Judicial Code dispensing with amount in controversy, but respondents fully carried the burden of proof under the section of the Judicial Code requiring a minimal jurisdictional amount—as the lower courts concurrently found.

Rulings Below on Jurisdiction

The District Court, upon appropriate findings of fact, held jurisdiction to have been properly based upon Section 24 (14) of the Judicial Code (civil rights; no minimal jurisdictional amount in controversy required); or, independently, upon Section 24 (1) (Federal question and $3,000.); or, independently, upon Section 24 (12) (conspiracy to deprive citizens of civil rights; no amount required).

The Circuit Court of Appeals unanimously affirmed the holding as to Section 24 (14). It also affirmed the holding as to Section 24 (1), Judge DAVIS dissenting. It found it unnecessary to discuss Section 24 (12) as a cumulative basis of jurisdiction.

A. Jurisdiction existed under Section 24 (1) of the Judicial Code

1. *Both Lower Courts Having Found Minimal Amount as a Fact, This Court Will Not Ordinarily Disturb the Findings.*

Conventional jurisdiction was asserted herein under Section 24 (1) of the Judicial Code (Federal question and

$3,000) (R. 7, 18). That Federal questions are involved is clear. The various features of the case are brought within provisions of the Constitution and the whole of the case is within the substantive scope of 8 U. S. C., Section 43 (considered below).

The only possible doubt that may arise is as to jurisdictional amount—a matter of *fact*.

The facts adduced before the trial court showed a single "deliberate policy" of excluding and removing respondents from the City of Jersey City by force and violence, preventing the dissemination of literature by them, gagging them, etc.—all with the intent and purpose of preventing the respondents from pursuing their normal objectives and regular callings (Findings A-1, 2, B-1, 2)—an intent and purpose which were successfully consummated, resulting in the total suppression of the respondents. Petitioners' acts, though complained of under the Constitution and laws of the United States, were obviously tortious in character. The specifically economic aspects of the controversy are also evident.

After a trial lasting many days, in which a four volume record was compiled showing the nature and extent of the deprivations involved as well as their effect upon the respondents, the trial court found as a *fact* that the required jurisdictional amount was present (Findings F-1, 2).

The Circuit Court of Appeals, after an unusually searching and careful inquiry into the record facts, confirmed these findings of the trial court, saying in its opinion (4 R. 125-6):

> "* * * This was in effect a finding by the court that each of the [respondents] might have recovered such a sum in damages for each deprivation of a right. It was also the equivalent of a finding that the amount claimed by the [respondents] to be in controversy was averred by them in good faith.
>
> "*In our opinion the court below would not have been justified in holding otherwise.* Wiley *v.* Sinkler,

> *supra* [179 U. S. 58]. Its finding is precisely similar to that of a jury in an action for damages brought to redress the deprivation of civil rights and was not required to be based on specific evidence as to the value but rather on the trial judge's own knowledge and opinion as to the value and as to the exemplary or punitive damages which might be reasonably awarded. Wayne *v.* Venable, 260 F. 64."

There is thus presented in the case the concurrence of both the trial and the appellate courts on a jurisdictional fact, upon a full consideration of the evidence upon the weight of which, both courts, as equity tribunals, were authorized to pass. It is a fundamental rule of this Court that a finding of fact thus doubly assured will not be disturbed in the absence of clear showing of error. *Shappirio* v. *Goldberg,* 192 U. S. 232, 240 (1904); cases, *supra,* pp. 2-3. This Court has been loath to disturb factual findings on jurisdictional amount. In *Zeigler* v. *Hopkins,* 117 U. S. 683, 689 (1886), this Court said:

> "We are entirely satisfied that the suit was instituted in good faith by real parties for the determination of a substantial right, and that it fairly presents the questions involved. The Court below found as a fact that the value of the premises in dispute exceeds $6,000, and this appears on the face of the record. While the affidavits as to value presented by Rosenbaum, taken by themselves, show that possibly the property may be worth less than $5,000, *they are not enough to overcome the finding of the court below that it was actually worth more than that sum.*"

To the same effect are:

> *Gage* v. *Pumpelly,* 108 U. S. 164 (1883);
> *Risty* v. *Chicago, R. I. & P. R. R. Co.,* 270 U. S. 378, 389 (1926).

Not only is the "two-court" rule applicable, but it operates here in a field where, in any event, absence of jurisdictional amount must appear with the utmost clarity before it may be held not to exist.

It is unnecessary to a determination of this case to decide whether the rights here involved are, in the abstract, of the value of $3,000 or more. Enough for purposes of this case that two courts have found, under the *particular* circumstances of *this* controversy, that the rights have the requisite value.

It is respectfully submitted that the concurrent findings should not be disturbed.

Although the concurrent findings might be relied on without more, we shall address ourselves to a fuller consideration of the principles underlying them.

2. *The Evidence Below Supports the Lower Courts' Findings*

As has been said, the series of interferences by force, violence and conspiracy with the rights of the respondents involving freedom of speech, of press and assembly, freedom from unlawful arrest and freedom to pass unmolested along the public streets and at will into and out of the City or State, as well as freedom to carry on legitimate occupations and to work for a living, constituted tortious acts, both joint and several, for which actions at law might have been prosecuted and vindictive damages recovered (see cases cited at 4 R. 125); and acts which, because of their continuous character, became the subject of equitable cognizance.

What proof then of pecuniary value is required in such actions, sounding in tort, when relief has been sought in equity for injunction rather than at law for compensation? Surely as to torts already committed, the value of the matter in controversy must be the same, whichever court

be invoked. And that value when unliquidated must be in the one instance appraised by the jury, in the other by the judge. The findings of fact by a jury surely have no more dignity than those by a judge and we have already noted that the Circuit Court of Appeals affirmed the trial judge's finding of jurisdictional amount.

If the rulings below on this subject are to be reviewed even without benefit of the "two-court" rule, the criterion to be applied must be that enunciated by this Court in a series of cases, of which *Put-In-Bay Waterworks, L. & R. Co.* v. *Ryan*, 181 U. S. 409 (1901), is typical. This Court said (pp. 430-1):

> "And it has been several times decided by this court that a suit cannot properly be dismissed by a circuit court as not involving a controversy of an amount sufficient to come within its jurisdiction, *unless the facts, when made to appear on the record, create a legal certainty of that conclusion.* *Barry* v. *Edmunds*, 116 U. S. 550; *Wetmore* v. *Rymer*, 169 U. S. 115."

The various tests of value applicable to the facts of this case will be briefly considered.

a. *The value of the rights sought to be vindicated is the general criterion.*—This Court has in numerous cases held that the averment of jurisdictional amount, when the value of the rights sought to be protected is not liquidated, will sustain jurisdiction unless obviously colorable or made in bad faith. Thus in *Smithers* v. *Smith*, 204 U. S. 632, 642 (1907), Mr. Justice Moody stated the governing rule as follows:

> "Ordinarily the plaintiff's claim with respect to the value of the property taken from him or the amount of damages incurred by him through the defendants' wrongful act measures, for jurisdictional purposes, the value of the matter in controversy [citing cases], unless, upon inspection of the

> plaintiff's declaration, it appears that, as a matter of law, it is not possible for the plaintiff to recover the jurisdictional amount [citing cases]."

In his opinion in the Circuit Court of Appeals, Judge Biggs held that the factual findings of the trial court on jurisdiction sustained the good faith of respondents in alleging amount in controversy (4 R. 125-6).

Moreover, it is settled that in cases in equity seeking injunctive relief the value of the matter in dispute is that of the object of the bill.

One of the leading decisions of this Court illuminating this principle is *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U. S. 121 (1915). The bill sought to enjoin a rival electric company from interfering with plaintiff's business. The District Court dismissed the bill after testing jurisdiction by the cost of removing the poles and wires which caused the interference. Mr. Justice Pitney, speaking for this Court, which reversed the action of the lower court, said (pp. 125-6):

> "We are unable to discern any sufficient ground for taking this case out of the rule applicable generally to suits for injunction to restrain a nuisance, a continuing trespass, or the like, viz., that the jurisdictional amount is to be tested by the value of the object to be gained by complainant. The object of the present suit is not only the abatement of the nuisance, but (under the prayer for general relief) the prevention of any recurrence of the like nuisance in the future. In *Mississippi & M. R. Co.* v. *Ward*, 2 Black, 485, 492, it was said: 'The want of a sufficient amount of damages having been sustained to give the Federal courts jurisdiction will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern.' The same rule has been applied in numerous cases, and under varying circumstances. *Scott* v. *Donald*, 165 U. S. 107, 115; *McNeill* v. *Southern R. Co.*, 202 U. S. 543, 558; *Hunt* v. *New York Cotton Exc.*, 205 U. S. 322, 336;

Bitterman v. *Louisville & N. R. R. Co.*, 207 U. S. 205, 225; *Berryman* v. *Whitman College*, 222 U. S. 334, 345."

The "value of the right" principle received an interesting application in *Evenson* v. *Spaulding*, 150 Fed. 517 (C. C. A. 9th, 1907), which involved a suit to enjoin a wrongful combination by defendants to interfere with the complainant's business as a vendor of buggies, in the course of which defendants followed complainant's agents and harassed them by interrupting conversations with customers and intimidating the agents in ways bearing a marked similarity to some of the methods of petitioners in this case. Viewing the realties of the present day, it should make no difference that C. I. O. is a labor union pursuing the objective of organizing the unorganized, whereas the plaintiff in the *Evenson* case was a vendor of buggies. In each case economic activities were the subject of interference and the value of the right to be free of such interference is determinative as to the amount involved. In this connection also weight should be given to the line of cases represented by *Rocky Mountain Bell Tel. Co.* v. *Montana Federation of Labor*, 156 Fed. 809 (D. Mont. 1907), and *Tri-City Central Trades Council* v. *American Steel Foundries*, 238 Fed. 728 (C. C. A. 7th, 1917), *mod.*, 257 U. S. 184 (1918), in which labor unions were enjoined from injuring the business of plaintiffs, jurisdiction being sustained on the test of the value of the rights of the plaintiffs to conduct their enterprises.

b. *Value of civil rights.*—While the value of social or political rights is not capable of exact admeasurement, this Court has repeatedly adjudged that presumptively they have a value in excess of the jurisdictional amount. It would indeed be a travesty if rights so fundamental, and for that reason inestimable, were held to be worthless; and this Court has ruled to the contrary.

In *Wiley* v. *Sinkler*, 179 U. S. 58 (1900), suit was brought to recover damages for wilful denial by an election board of the plaintiff's right to vote in a Federal election. It was held that the cause of action arose under the Constitution or laws of the United States. On the question whether the jurisdictional amount (then $2,500) was made out, the Court said (p. 65):

> "The damages are laid at the sum of $2,500. What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury, and no opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the Circuit Court. *Barry* v. *Edmunds*, 116 U. S. 550; *Scott* v. *Donald*, 165 U. S. 58, 89; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 468, 472; *North American Transp. & Trading Co.* v. *Morrison*, 178 U. S. 262, 267."

In *Swafford* v. *Templeton*, 185 U. S. 487 (1902), the *Wiley* case was cited with approval and followed. Again in *Giles* v. *Harris*, 189 U. S. 475 (1903), Mr. Justice Holmes, for a majority of the Court, approved the doctrine of the *Wiley* and *Swafford* cases and applied it to a bill in equity.

In a more recent case, *Nixon* v. *Herndon*, 273 U. S. 536 (1927), Mr. Justice Holmes summarized the law in characteristic fashion (p. 540):

> "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years, since *Ashby* v. *White*, 2 Ld. Raym. 938, 92 Eng. Reprint, 126, 1 Eng. Rul. Cas. 521, 3 Ld. Raym. 320, 92 Eng. Reprint, 710, and has been recognized by this Court. *Wiley* v. *Sinkler*, 179 U. S. 58, 64, 65; *Giles* v. *Harris*, 189 U. S. 475, 485.

See also Judicial Code, Sec. 24 (11), (12), (14). Act of March 3, 1911, Chap. 231, 36 Stat. at L. 1087, 1092, Comp. Stat. Sec. 991, 4 Fed. Stat. Anno. 2d ed., p. 840."

See also:

McNichols v. *Internat'l Typ. Union*, 21 F. (2d) 497, 498 (C. C. A. 7th, 1927).

As was said in *Wayne* v. *Venable*, 260 Fed. 64, 66 (C. C. A. 8th, 1919):

> "In the eyes of the law this right [to vote for a member of Congress] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury. * * *"

Manifestly the reasoning of the cited cases applies with increased vigor where the rights sought to be protected by injunction are not only political but civil and economic. If interference with the right to vote has a value in excess of the jurisdictional minimum, certainly the rights of free speech, free press, lawful assembly, freedom of locomotion and freedom to do lawful work have a value which a trial court may properly find to be in excess of the jurisdictional minimum.

Moreover, the economic phases of these rights in so far as respondents are concerned are patent; petitioners have sedulously avoided reference to, or consideration of, such rights as instrumentalities of an economic undertaking. Respondents C. I. O. and affiliated unions pursue as their calling or business labor organizational work which is dependent upon exercise of civil liberties. Respondent A. C. L. U. is organized to defend against violation of civil liberties and to encourage the exercise of those liberties, and it solicits and receives funds for this purpose.

The individual respondents are the regional director and field representatives of the C. I. O., who in the performance of their work must rely upon the civil liberties heretofore described. These facts offer an additional basis upon which jurisdictional amount may be predicated in relation to the civil rights infringed by petitioners.

Referring to *Wiley* v. *Sinkler, supra,* and *Nixon* v. *Herndon, supra,* petitioners state in their brief (p. 80):

> "So far as presumptive jurisdictional amount is concerned, those cases are in the same category as common law actions for negligence, false imprisonment and the like. * * *"

But so are the overt acts alleged in the complaint and found by the lower courts, the tortious nature of which has been mentioned. In view of the findings that conspiracy, force and violence were resorted to by petitioners to prevent the enjoyment by respondents of their civil rights, the attempted distinction of the cited cases is wholly ineffectual.

But it is not even important to determine whether the acts here involved were tortious. A cause of action is furnished by the Constitution and laws of the United States—whether sounding in tort or not. The sole question is whether the rights have value, and if it was held in the cases cited that the right to vote has value, it must by parallel reasoning be held that the civil rights at bar have value.

c. *"Property rights."*—Under Point III (b) of their brief petitioners assert that to satisfy minimum amount the subject matter of a suit must be something in the nature of a property right capable of financial appraisal, excluding speculative damages which might result from the wrong complained of. Essentially the issue on this phase of the argument is whether the rights here infringed are less capable of financial appraisal than the right to vote under the line of cases beginning with *Wiley* v. *Sinkler,* above considered.

Such cases as *Barry* v. *Mercein*, 5 How. 103, and *Kurtz* v. *Moffitt*, 115 U. S. 487, cited by petitioners, have no relevancy. In *Barry* v. *Mercein* an effort to obtain from a Federal court on the ground of diversity of citizenship a writ of habeas corpus to determine the rival claims of separated parents to the custody of a child, was properly held to involve no property right as the right to the custody of a child was incapable of being reduced to a pecuniary standard of value. In *Kurtz* v. *Moffitt* this Court reviewed with care all of the enactments bearing upon the writ of habeas corpus and concluded that an examination into the legality of the process under which state authorities purported to hold a person in custody involved a legal question incapable of financial appraisal. Therefore this Court sustained the refusal of the lower court to remove the proceedings to the Federal courts, but considered the case upon its merits by writ of error sued out by the prisoner and on this writ of error reversed the State court in its remand of the prisoner to custody. In neither instance was there any case capable of sounding in damages. The action was not one of false arrest or imprisonment as ordinarily understood, but one inquiring into the power, under the law, of the custodian to retain the custody.

As to the other cases cited by petitioners such as *Healy* v. *Ratta*, 292 U. S. 263, and *Youngstown Bank* v. *Hughes*, 106 U. S. 523, the statements in their brief of the basis of decision amply furnishes the grounds of distinction. Petitioners, however, seek to assimilate these cases to the instant one by gratuitously assuming that jurisdiction is predicated upon speculative damages which respondents might suffer if prevented in the future from carrying on certain activities, quite overlooking the fact that the injury is not merely threatened but involves as well tortious action in the past which already had inflicted substantial damage, carried out as it was by a combination of C[illegible] officials which both lower courts found

to exist and to threaten the perpetration of similar acts in the future.

Petitioners wholly ignore the fact that the rights of which respondents were deprived were by them attempted to be exercised in pursuance of a Federally declared policy incorporated in the National Labor Relations Act (29 U. S. C., Sections 151-166).

Plainly, workers cannot be organized unless they can be approached, and the testimony in this case from start to finish indicates that the City authorities have, by application of unconstitutional ordinances and regulations, by discriminatory enforcement of ordinances and regulations, and by action *per se* unconstitutional, so limited the right of C. I. O. to communicate with workers as to make organization impossible, and by the same token to render the Labor Act a nullity in Jersey City. The point was best summarized by the witness Macri when he said (R. 961):

> "It has hampered a whole lot the organization drive of organizing the unorganized workers in Jersey City."

The Labor Act was passed to insure that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection" (Section 157). Mayor Hague conceded that many industries located in Jersey City deal in interstate commerce (Exh. P-37; R. 1221-22); and the efforts of C. I. O. to organize workers in the City is, as the evidence indicates, bottomed upon the Act. It is difficult to see how frustration of the very objective of the Act can be said not to result in pecuniary damage.

Petitioners urge that rights such as freedom of speech and public assembly are not calculable in terms of money.

But when these rights, together with others here involved, condition the performance of one's normal work or calling it follows that their denial results in destruction of the opportunity to work or pursue one's calling. That the civil rights of which the individual respondents were deprived, so that they were unable to work in Jersey City, have an economic aspect is settled by the decision of this Court in *Truax* v. *Raich*, 239 U. S. 33 (1915). In upholding injunctive relief against threatened interference by State authorities with employment at will, Mr. Justice HUGHES said (p. 41):

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Allegeyer* v. *Louisiana*, 165 U. S. 578, 589, 590; *Coppage* v. *Kansas*, 236 U. S. 1, 14."

That respondents C. I. O. and its affiliated unions and A. C. L. U. as a membership corporation were also deprived of rights of a pecuniary nature is evident from the Court's decision in *International News Service* v. *Associated Press*, 248 U. S. 215, 236 (1918). There Federal jurisdiction was invoked on an allegation of diversity of citizenship and damage in excess of $3,000. The Court, in an opinion by Mr. Justice PITNEY, extended the principle of the *Truax* case to all civil rights used to further economic interests:

> "In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights *treats any civil right of a pecuniary nature as a property right*

(*Re Sawyer*, 124 U. S. 200, 210; *Re Debs*, 158 U. S. 564, 593); *and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired* (*Truax* v. *Raich*, 239 U. S. 33, 37-38; *Brennan* v. *United Hatters*, 73 N. J. L. 729, 742; *Barr* v. *Essex Trades Council*, 53 N. J. Eq. 101.)"

d. *Value in cases of repeated trespass and other torts.*—The record is replete with evidence of assaults, molestations, false imprisonment and false arrests of respondents in pursuance of the deliberate and malicious policy applied against them by petitioners. The findings speak of "exclusion, removal, personal restraint and interference • • • carried out by force and violence" and on "administrative fiat" (C-8). Pertinent to jurisdiction is the following factual finding (F-2):

> "The enforcement of the defendants' policies above set forth, as against the plaintiffs herein, results in irreparable damage to them and the threat of continued enforcement of said policies against them involves a threat of manifold and repeated prosecutions for alleged offenses and manifold and repeated invasions of their rights."

Had respondents brought actions for damages on the law side of the District Court, each could in good faith have alleged compensatory and exemplary damages in excess of $3,000 and jurisdiction would have definitely attached. *Barry* v. *Edmunds*, 116 U. S. 550 (1886); *Ragsdale* v. *Rudick*, 293 Fed. 182 (C. C. A. 5th, 1923).

A striking application of this principle is contained in *Hynes* v. *Briggs*, 41 Fed. 468 (D. Ark. 1890). The plaintiff charged false imprisonment through deprivation of his liberty for fifteen minutes by defendants, a sheriff and a justice of the peace, for refusal to pay a license fee demanded of him under a State statute prescribing fees for persons engaged in designated occupations. Damages

of $10,000 were claimed. Defendants challenged the jurisdiction of the court on the ground that the amount is controversy did not exceed the jurisdictional minimum as appeared by the agreed statement of facts and that plaintiff must have known his damages were less when he instituted his suit. The court overruled these objections, stating (p. 471):

> "The rule of action, and the possible results, in this class of cases was well expressed by Lord Temple in a speech in the house of lords, when he said:
>
> " 'That noble and learned lord (Camden) has said, I believe, on other occasions, and he has said well, the price of one hour's English liberty none but an English jury could estimate, and juries, under his guidance, have put a very high value upon it, in the case of the meanest of our fellow-subjects, when oppressed by the servants of the state.' 6 Camb. Lives Ld. Ch. 384.
>
> "No court would be justified in saying that an American jury could not rightfully award more than $2,000 damages to a citizen who had been illegally deprived of his liberty, for fifteen minutes, by a public officer acting without the sanction of any law."

It is immaterial that respondents joined in a suit to restrain the repeated and continuous trespasses and other tortious acts rather than filed actions for damages. They sought to vindicate their right to be free from unlawful interferences, and the value of that right is determinative of amount in controversy under the authorities cited in subdivision a, *supra*. Past acts and future or threatened probabilities enter into such calculation. *Fidler* v. *Roberts*, 41 F. (2d) 305 (C. C. A. 7th, 1930).

e. *The rule of aggregation to establish the minimum jurisdictional amount is also applicable.*—The C. I. O. and the individual respondents as its organizers have essen-

tially a joint and common interest, for the defeat of which the reprehended actions of the petitioners were undertaken. The respondents were not maltreated on separate and distinct grounds, but were the victims of a common policy which made a man's affiliation with the C. I. O. sufficient ground for his designation as an "undesirable" and therefore as one who had no civil rights in Jersey City. The petitioners say (Br., p. 79):

> "The most that can be said is that if the respondents are permitted to exercise the activities purportedly secured to them by the decree of the Court below, they may, perhaps, consequently have greater success in organizing particular types of labor unions in Jersey City; that if they are successful in that regard, they may realize increased revenues in the form of dues and other perquisites, and that such revenues may ultimately amount to sums exceeding the jurisdictional amount required by Section 24 (1)."

This statement concedes some pertinent elements, but ignores many others which we have touched upon,—*i. e.*, the value generally of the rights sought to be vindicated as the basic elements upon which rest the work of labor unions and their organizers and interference with which would, if sustained, be tantamount to obliteration of labor unions; the value of civil rights of the individual respondents as citizens; the property rights of the plaintiffs; and the torts committed by respondents prior to the filing of the complaint, continuance of which was threatened.

These values and claims may all be aggregated in determining jurisdictional amount under the principle of *Troy Bank* v. *Whitehead*, 222 U. S. 39 (1911), in which the Court said:

> "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional

> amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." [Citing cases.]

Moreover, this may be regarded as a representative suit in behalf of all C. I. O. unions and members so that the aggregate interests of the whole class constitute the matters in dispute. *International News Service* v. *Associated Press, supra; Local No. 7 B. M. P. I. U.* v. *Bowen,* 278 Fed. 271 (S. D. Tex. 1922); *Local Union A. A. S. E. R. E.* v. *Joplin & P. R. Co.,* 287 Fed. 473 (C. C. A. 8th, 1923).

The charges of conspiracy also permitted aggregation of plaintiffs' claims. In Part One of this brief the evidence in proof of conspiracy by petitioners against respondents is set out. It should be noted that the policy applied was not a new one evolved in November, 1937. It was a well conceived and carefully executed policy dating back to the year 1936, for the restraint of which recourse had already been had to the District Court in the case of *Casey* v. *American Civil Liberties Union and Boot and Shoe Workers' Union,* in which similar activities on the part of some of the petitioners herein against one of the respondents herein were preliminarily restrained. An appeal from the injunctive order was submitted to the Third Circuit Court of Appeals at the October Term, 1937, and was dismissed in December, 1938, since the situation therein complained of was held by a majority of the court to have become moot, Judge Biggs dissenting in a separate opinion (100 F. [2d] 354).

Indeed the definiteness of the policy adverted to is such as fully to justify the findings of unlawful combination; and a combination of such a character, uninterruptedly continued, appears sufficient to bring the case under the doctrine of *McDaniel* v. *Traylor,* 196 U. S. 415 (1905). In that case a decedent's estate was permitted

to aggregate the "amount of the claims fraudulently procured by the defendants, acting in combination, to be allowed in the Probate Court as claims against the estate." The Court stated its conclusion as follows (p. 297):

> "By reason of that combination, resulting in the allowance of all those claims in the probate court, as expenses of administering the estate of Hiram Evans, the defendants have so tied their respective claims together as to make them, so far as the plaintiffs and the relief sought by them are concerned, *one* claim. The validity of all the claims depend upon the same facts."

The theory here suggested was more fully developed in *Sovereign Camp, etc.* v. *O'Neill,* 266 U. S. 292 (1924), where this Court reviewed its earlier decisions. The conspiracy in that case involved a combination on the part of twenty-five members of the plaintiff fraternal society to mulct the society by prosecuting baseless claims for travelling and other expenses as alleged delegates of the society. The bill was dismissed below for lack of jurisdictional amount existing in favor of the society as against any one member. This Court reversed, saying (p. 297):

> "A conspiracy to prosecute, by concert of action, numerous baseless claims against the same person for the wrongful purpose of harassing and ruining him, partakes of the nature of a fraudulent conspiracy; and in a suit to enjoin them from being separately prosecuted, it must likewise be deemed to tie together such several claims as one claim for jurisdictional purposes, making their aggregate amount the value of the matter in controversy."

It is respectfully submitted that on these authorities the aggregation of all of the claims of respondents as hereinbefore analyzed was permissible, particularly in view of the express holding of the trial court that the action of petitioners covered in the several subdivisions of the findings was in pursuance of a deliberate policy and the rul-

ing in the conclusions of law that respondents have established and proved a cause of action, among others, under conspiracy sections of the United States Code (Title 8, Section 47 (3), reinforced by Title 18, Section 51), considered *infra* as affording independent grounds of Federal jurisdiction.

By way of conclusion of our argument under Section 24 (1), it should be observed that admittedly this is a case arising under the Constitution and laws of the United States, so that this Court is the ultimate arbiter of the matters involved. Basically, therefore, the question is whether under the facts established, this case should have come to this Court through the lower Federal courts or through the State courts. *Jurisdictional amount has varied from time to time and is merely an index of importance fixed by Congress to relieve the lower Federal courts of comparatively unimportant cases which could safely be left to State tribunals. Both the trial court and the Circuit Court of Appeals have determined that the rights here involved are so valuable that the controversy satisfies the present index of importance as fixed by Congress. It was not the legislative intent to have this index applied by a bookkeeping technique.*

B. Jurisdiction existed under Section 24 (14) of the Judicial Code (civil rights).

1. *Scope of Judicial Code, Section 24 (14), and the Cognate 8 U. S. C., Section 43.*

Subdivision 14 of Section 24 of the Judicial Code provides for original jurisdiction in the District Courts without any requirement of amount in controversy, in the cases of great intrinsic importance described in the subdivision as follows:

> "*Suits to redress deprivation of civil rights.* Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

This subdivision was enacted in conjunction with, and implements the substantive provision now appearing in 8 U. S. C., Section 43, which reads as follows:

> "*Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Both sections just quoted are derived from "*An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes,*" commonly known as the Civil Rights Act (approved April 20, 1871).* It plainly appears from the title

*17 Stat. 13 (1871). The first section of this act provided: "That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication,' and the other remedial laws of the United States which are in their nature applicable in such cases."

The original Civil Rights Act of 1866 (14 Stat. 27), enacted under authority of the second clause of the Thirteenth Amendment, was called "An act to pro-

of the constitutive act, which states its purpose to be the *enforcement* of the Fourteenth Amendment; from the historical setting of the act, which indicates that the intention was to make altogether effective the strictures of the Fourteenth Amendment against invasion of civil rights by the States; from the titles of the particular sections here in question, which repeat the word "civil"; and from their texts, which closely parallel the language of Section 1 of the Fourteenth Amendment, that the animating design was to open the Federal courts to the enforcement of rights distinctively civil in character that fall within the scope of the Amendment. The Congress had reason to fear that it would not be enough to adopt the Amendment without enforcing it by appropriate substantive legislation; and that even such legislation would be ineffectual if suits thereunder were to be brought in the courts of the very States which had violated it, even though ultimate review could be had in this Court. For this reason the Congress explicitly conferred original Federal jurisdiction, and without any requirement of amount in controversy.

Thus a National pattern was sought to be imposed as to the fundamental civil rights; and they read the times wrongly who think that the imposition of such a pattern is not as necessary today as in the years following the Civil War.

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tect all persons in the United States in their civil rights and furnish the means of their vindication," having for its object the conferring of citizenship upon the negroes and securing to them the same fundamental rights as were enjoyed by white citizens. The constitutionality of that act was in doubt, and as a hostile Congress might still take away the rights declared by the act by repealing it, the Fourteenth Amendment, adopted in 1868 in order to obviate all constitutional objections, in its first section declared all persons born or naturalized in the United States to be citizens of the United States, as well as of the States in which they reside. The 1866 act was not deemed sufficient to provide measures of enforcement of the Fourteenth Amendment, see *Live-stock, etc., Ass'n* v. *Crescent City etc. Co.*, 1 Abb. (U. S.) 388 (1870), and the Congress, pursuant to the fifth section of the Fourteenth Amendment, approved the 1871 act. The substantive provision of this act was carried forward into the revision of 1878 as Section 1979 and reenacted in its present form in 1926, 8 U. S. C., §43. Similarly, the jurisdictional provision of the act was embodied in Section 24 (14) of the Judicial Code, 28 U. S. C., §41 (14), and is the result of a revision, by 36 Stat. 1092 (1911), of the jurisdiction which had been vested in the District Courts by paragraph 12 of the Revised Statutes of 1878, Section 563, and in the Circuit Court by paragraph 16 of the Revised Statutes, Section 629.

Petitioners urge a view of the statutory provisions which would in effect render them dead letters. At the same time they seek to attribute to the respondents a view of the provisions unduly broad and expansive. On account of petitioners' sedulous effort to obscure the true nature of respondents' position, we here set forth in summary form the interpretation of subdivision (14) and the cognate Section 43 for which we contend. In our view the proper construction of those statutory provisions is simply as follows:

Confining our view to the Fourteenth Amendment, we say that subdivision (14) and Section 43 create a cause of action in equity or at law, and provide a Federal forum for its enforcement, in cases where rights *distinctively civil* in character, embraced and protected by the Amendment, are claimed to have been infringed by action of officers or persons acting under State authority or under color of State authority. Under such construction the statutory provisions effectuate their historical purpose without unduly burdening or enlarging the original Federal jurisdiction.

Rights distinctively civil in character are secured by each of the three principal clauses of the first section of the Fourteenth Amendment, and subdivision (14) and Section 43 cover the civil rights so secured. Thus: (a) Civil rights secured by the "privileges or immunities" clause. (It should be noted that both subdivision (14) and Section 43 use the words "privilege" and "immunity.") (b) Civil rights secured by the due process clause. (Both subdivision (14) and Section 43 use the generic word "right" *in addition to* "privilege" and "immunity." And both speak of "person"—plainly indicating an intention to go beyond the "privileges or immunities" clause since the latter treats only of citizens of the United States.) (c) Civil rights secured by the equal protection clause. (Same comment.)

The case at bar plainly falls within the pertinent sections.

The rights asserted in the bill of complaint and vindicated by the decree under review are distinctively civil in character and are secured by Section 1 of the Fourteenth Amendment against infringement through State action. Each of the civil rights vindicated by the decree is secured by one or more of the three principal clauses of Section 1 of the Amendment. Thus the right of free passage through the United States is secured by the "privileges or immunities" clause and the due process clause;* the right to be free of physical restraint without arrest according to law, etc., is secured by the due process clause; the right to be free of unreasonable search and seizure is secured by the due process clause † (and perhaps also by the "privileges or immunities" clause, see 4 R. 108-9, 121-4); the rights of free speech, free press and peaceable assembly are secured by the due process clause (and perhaps also by the "privileges or immunities" clause, see 4 R. 121-4). To the extent that discrimination was shown—and discrimination pervades the case and the findings—the equal protection clause is also involved. The case is therefore one which falls patly within subdivision (14) and Section 43. Indeed, taking the case as an integrated whole, no clearer instance for the application of a civil rights act could well be imagined.

The Circuit Court of Appeals succinctly summarized the situation here at bar when it said:

> "It is clear therefore that they [subdivision (14) and Section 43] refer to the civil rights secured by the Fourteenth Amendment, including those fundamental rights which are involved in this suit" (4 R. 123).

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* Also by the interstate commerce clause.

† Both lower courts held, and we have contended above, that this right is protected by the due process clause. Even if the right is not so protected, however, it is integrated with all the other rights vindicated in this case, which are so protected, and jurisdiction over it would be sustained as over an ancillary "local" ground.

A word should be added at this point concerning the civil rights which are today secured against State invasion by the due process clause of the Fourteenth Amendment (and possibly also by the "privileges or immunities" clause). Petitioners have wrung confusion upon confusion by citing and quoting from cases in this Court and elsewhere dating prior to 1925, reflecting the then current view that the fundamental civil liberties such as free speech, free press and peaceable assembly were not protected in any sense by the Fourteenth Amendment. Such was the law prior to 1925.* See, *e. g., Ex parte Spies,* 123 U. S. 131 (1887); *Maxwell* v. *Dow,* 176 U. S. 581 (1900). Since *Gitlow* v. *New York,* 268 U. S. 652 (1925), and *Fiske* v. *Kansas,* 274 U. S. 380 (1927), however, it is no longer open to question that these civil rights are as much within the ambit of the due process clause as vested rights of property, which were likewise brought within this clause only as the result of a lengthy and tortuous development. See *Allgeyer* v. *Louisiana,* 165 U. S. 578 (1897).

The view that the fundamental civil rights secured by the first section of the Fourteenth Amendment, whether specifically attributable to the "privileges or immunities" clause, the due process clause, or the equal protection clause, are substantively enforceable by Section 43 and jurisdictionally covered by subdivision (14)—the view adopted by all judges below—is amply supported by the cases. Indeed some of the cases might be said to establish that the statutory provisions extend also to property rights mixed or connected with civil rights provided only that the rights in combination are secured by Section 1 of the Fourteenth Amendment. What is entirely clear, however, is that the statutory provisions do extend to civil rights such as those involved in this case. *Raich* v. *Truax.*

* Except that the right peaceably to assemble and petition *any National authority* for a redress of grievances appears from an early date to have been recognized as a privilege protected against State invasion by the "privileges or immunities" clause of the Fourteenth Amendment. See *infra,* p. 135.

219 Fed. 273, *aff'd sub nom. Truax* v. *Raich*, 239 U. S. 33 (1915) (HUGHES, *J.*); *Giles* v. *Harris*, 189 U. S. 475 (1903) (HOLMES, *J.*); *Nixon* v. *Herndon*, 273 U. S. 536 (1927) (HOLMES, *J.*); *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68 (1900); *Crane* v. *Johnson*, 233 Fed. 334, *aff'd*, 242 U. S. 339 (1917); *Dugan* v. *Bridges*, 16 F. Supp. 694, *app. dism.*, 300 U. S. 684 (1936); *Anderson* v. *Myers*, 182 Fed. 223, *aff'd*, 238 U. S. 368 (1915); *Schlosser* v. *Welsh*, 5 F. Supp. 993 (D. S. Dak. 1934); *Davenport* v. *Cloverport*, 72 F. 689 (D. Ky. 1896); *Lawless* v. *Duval County*, 6 F. Supp. 303 (D. Fla. 1934); *Simpson* v. *Geary*, 204 Fed. 507, 511-12 (D. Ariz. 1913); *Paramino Lumber Co.* v. *Marshall*, 18 F. Supp. 645, *aff'd*, 95 F. (2d) 203 (C. C. A. 9th), *cert. den.*, 83 L. Ed. 12 (1938); *Farson* v. *City of Chicago*, 138 Fed. 184 (D. Ill. 1905); *Broom* v. *Wood*, 1 F. Supp. 134, 136, *rev'd on other grounds*, 287 U. S. 1 (1932); *Salander* v. *City of Tacoma*, 208 Fed. 427 (D. Wash. 1913).

2. *Petitioners' erroneous contention that the provisions of the Civil Rights Act cover only such rights protected by the Fourteenth Amendment as originated in or were "created" by provisions of the Constitution other than the Fourteenth Amendment itself—thus erroneously confining the provisions of the Civil Rights Act to so-called rights of National citizenship and unwarrantably reading the word "secured" in the Civil Rights Act as meaning "created".*

As set forth above, respondents take the position that the provisions of the Civil Rights Act—subdivision (14) and Section 43—in speaking of rights "secured", include the basic civil rights which are protected by the Fourteenth Amendment against State invasion, thus according with the ordinary, common-sense meaning of the word "secured".

In the face of the plain language of the statutory provisions and the even plainer logic of Judge BIGGS' opinion

below, supported by the authorities just cited, petitioners urge a view of those provisions which would effectively nullify them by reading a peculiar gloss over the word "secured", as follows: Petitioners say there are two kinds of rights which the Fourteenth Amendment protects: (1) the rights which originated or were created by provisions of the Constitution other than the Fourteenth Amendment itself, and which were guaranteed against State invasion by the Fourteenth Amendment (these rights turn out to be the so-called rights of National citizenship falling within the "privileges or immunities" clause); (2) fundamental or inherent rights not originating in or created by any provisions of the Constitution, which are none the less guaranteed against State invasion by the Fourteenth Amendment (these turn out to be the basic rights falling within the due process and equal protection clauses). The first category of rights, say petitioners, is within the provisions of the Civil Rights Act as rights "secured" by the Constitution; the second category is not. The first category of rights, it appears upon examination, comprises virtually no significant right except that of free passage through the United States; this right petitioners may—it does not appear clearly from their brief—grudgingly concede to fall within the civil rights provisions. The second category of rights comprises the fundamental civil rights and these are conveniently excluded by petitioners from the civil rights provisions.

It is to be noted that petitioners are compelled to concede that both the categories of rights which they choose to set up are guaranteed against State invasion by the Constitution of the United States, *i. e.*, the Fourteenth Amendment. The only alleged difference between them is that one category is said to have originated in or been "created" by some part of the Constitution other than the Fourteenth Amendment itself, while the second category is said not to have so originated or been so created but to be fundamental or inherent. The statutory word

in question is "secured". Just why rights admittedly *guaranteed* in a significant way by the Fourteenth Amendment—*i. e.*, guaranteed against State invasion—are not to be deemed *"secured"* by it—apart from the question of how they originated or were created—nowhere appears in petitioners' argument.

Petitioners' construction of the provisions of the Civil Rights Act involves a manipulation of statutory language by which the word "created" would be deliberately substituted for the word "secured". It also involves the result that the Civil Rights Act would cover only a relatively insignificant portion of the civil rights protected by the Fourteenth Amendment, despite the evident intention of the Congress, as expressed in the very title of the Act, that the Act should cover all the civil rights protected by the Fourteenth Amendment.

The sole basis of petitioners' extraordinary contention is two cases—the *Slaughter House Cases*, 16 Wall. 36 (1873), and *United States* v. *Cruikshank*, 92 U. S. 542 (1876)—both reflecting a narrow view of the scope of the Fourteenth Amendment long since discountenanced by this Court. Some historical treatment becomes necessary.

The Fourteenth Amendment was ratified by the required number of States on July 9, 1868. One of the laws soon adopted in pursuance of the fifth section of the Amendment was an enforcement act of 1870, containing the criminal section quoted in the margin* (made the basis

* "That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this Act, or to injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court—the fine not to exceed $5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from, holding any office or place of honor, profit, or trust created by the Constitution or laws of the United States" (16 Stat. 141).

of the prosecution in *United States* v. *Cruikshank,* discussed *infra*), now appearing in modified form in 18 U. S. C., Section 51.

In May, 1871, there arose for decision, in *United States* v. *Hall,* Fed. Cas. #15282 (C. C. Ala.), the question whether the right of free speech and peaceable assembly were "secured * * * by the constitution" within the meaning of that section. It was recognized by all that the question whether the rights were secured by the Constitution within the meaning of the enforcement law necessarily turned on whether they were secured by the Fourteenth Amendment since, as has been said above, the enforcement laws derive their basic substantive content from that Amendment. For the defense it was argued that the rights were not "secured," that is to say, were *in no sense protected* by the Fourteenth Amendment, on the theory that the Amendment was intended to protect against invasion only those rights originating in or created by other provisions of the Constitution—i.e., rights of National citizenship such as the right of free passage through the United States—and not inherent or fundamental rights such as free speech. (Only the "privileges or immunities" clause of the Amendment was deemed relevant to the inquiry; it was not then urged or believed that other clauses had any bearing.) The Circuit Court disposed of the contention with the utmost clarity, holding that the Amendment, by means of the "privileges or immunities" clause, protected against invasion not only the rights of National citizenship originating in or created by other provisions of the Constitution, but the fundamental or inherent rights as well. These latter rights were therefore "secured," *i. e.,* protected or guaranteed, by the Fourteenth Amendment, and therefore similarly secured by the enforcement law. The case held, in other words, that *all the rights protected or guaranteed by the Fourteenth Amendment must be deemed secured by it irrespective of whether, in a historical or metaphysi-*

cal sense, they originated in or were created by other provisions of the Constitution or, on the contrary, were fundamental and inherent. To repeat: the case stated with almost prophetic vision the present position of this Court on the scope of the Fourteenth Amendment—that the fundamental civil rights are protected by it—although the case reached its conclusion by means of the "privileges or immunities" clause rather than the due process clause. Further, the court in the *Hall* case took the common-sense position that all the civil rights in any way protected by the Fourteenth Amendment are secured by it and by the same token were secured by the enforcement law. Said the court:

> *"* * * are these rights secured to the people by the Constitution of the United States? We find that congress is forbidden to impair them by the first amendment, and the states are forbidden to impair them by the fourteenth amendment. Can they not, then, be said to be completely secured? They are expressly recognized, and both congress and the states are forbidden to abridge them. Before the fourteenth amendment, congress could not impair them, but the states might. Since the fourteenth amendment, the bulwarks about these rights have been strengthened, and now the states are positively inhibited from impairing or abridging them, and so far as the provisions of the organic law can secure them they are completely and absolutely secured."*

The *Hall case*—with the singular exception that the due process clause and not the "privileges or immunities" clause was destined to cover the fundamental civil liberties—represents present law.

It will now be shown that authorities cited by the petitioners fall within a stage of constitutional development intervening between the *Hall* case and the re-birth of the doctrine of the *Hall* case in *Gitlow* v. *New York* and *Fiske* v. *Kansas, supra,* and are now entirely outmoded.

Petitioners cite as the fulcrum of their argument the *Slaughter House Cases* (1873)—cases arising on appeal from the State court and in no way treating of jurisdiction under the Civil Rights Act. There the State of Louisiana had by statute granted a virtual monopoly on the herding and slaughtering of cattle to a private corporation. The butchers adversely affected contended that the Fourteenth Amendment, then lately enacted, rendered the law unconstitutional as violative of each of the principal clauses of Section 1 of the Amendment; the "privileges or immunities" clause being most strenuously urged. Mr. Justice MILLER, speaking for a closely divided Court, disposed of the due process clause as wholly irrelevant to the issues. He likewise disposed of the equal protection clause by the simple statement that it was confined to discrimination on the ground of race or color—"We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision". Turning to the "privileges or immunities" clause, he said that the clause protected only against State invasion of rights of National citizenship, *i. e.*, rights attaching to National citizenship by virtue of other provisions of the Constitution, and did not protect against invasion of the fundamental or inherent rights of State citizenship, among which was the right to be free of monopoly exclusion in pursuing a livelihood. This in effect nullified the clause, since rights inherent in National citizenship had been held, prior to the adoption of the Fourteenth Amendment, to be protected against State invasion by reference to the general doctrine of the supremacy of the Federal Constitution and Federal laws. See *Crandall* v. *Nevada*, 6 Wall. 35 (1867).

Petitioners read the *Slaughter House Cases* as holding that only rights of National citizenship as above described are "secured" by the Fourteenth Amendment. What the case in fact held was that it was only rights of National

citizenship that were *protected in any sense* by the Fourteenth Amendment. *In other words, the holding was only as to the substantive scope of the Fourteenth Amendment.* There was no holding or even an intimation, nor could there possibly have been, that such rights as are protected by the Fourteenth Amendment in any sense can be divided for any significant purpose between such as are "secured" and such as are not "secured" although guaranteed and protected.

Whatever may be the meaning of the *Slaughter House Cases,* it is clear that they have been subjected to great attrition by subsequent decisions of this Court, largely in line with the views of the dissenters therein led by Mr. Justice FIELD. It was his view that the "privileges or immunities" clause must be interpreted to include those privileges "which of right belong to the citizens of all free governments", including the right to be free of monopoly, and, as so interpreted, should invalidate the Louisiana law; it was his view, further, that the due process clause covered the situation and should invalidate the law.

If we take the clauses of the Fourteenth Amendment in order and indicate their present content, it is clear that the majority opinion in the *Slaughter House Cases* is not today indicative of the substantive scope of the Fourteenth Amendment and therefore it cannot be indicative of the scope or meaning of the Civil Rights Act. (1) As to the due process clause, the view of the dissenting Justices has gradually prevailed as to rights of property and they are now plainly protected by the clause. See *Butchers Union Slaughter-House Co.* v. *Crescent City Slaughter-House Co.,* 111 U. S. 746 (1884) (FIELD, *J.*, concurring); *Barbier* v. *Connolly,* 113 U. S. 27 (1885) (FIELD, *J.*, writing for the Court); *Mugler* v. *Kansas,* 123 U. S. 623 (1887); *Powell* v. *Pennsylvania,* 127 U. S. 678 (1888); *Minneapolis & St. Louis Ry.* v. *Beckwith,* 129 U. S. 26 (1889); Pound, "Liberty of Contract", 18 Yale L. J. 454, 470 (1909). In ad-

dition, the due process clause has at least since 1925 been interpreted to cover the basic civil rights involved in this case—the rights of free press, free speech and peaceable assembly; this Court has adopted the view of Mr. Justice FIELD, also expressed in his dissent in the *Slaughter House Cases,* that these rights are protected by the Federal Constitution against State invasion, although the development has taken place under the due process clause rather than under the "privileges or immunities" clause. See *Gitlow* v. *New York; Fiske* v. *Kansas; Near* v. *Minnesota; Lovell* v. *City of Griffin; De Jonge* v. *Oregon,* all *supra;* Warren, "The New Liberty under the Fourteenth Amendment", 39 Harv. L. R. 431 (1927). (2) As to the equal protection clause, it is of course too obvious for discussion that the majority opinion in the *Slaughter House Cases* has been entirely superseded. (3) As to the "privileges or immunities" clause, it is still of indefinite intent, although it seems due for extension in view of *Colgate* v. *Harvey,* 296 U. S. 404 (1935). But it has always been understood as including the right of free passage throughout the United States—a right involved in the case at bar.*

Finally, so far have the *Slaughter House Cases* lost caste that even the precise factual situation presented in them would probably be otherwise determined by this Court today. *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402 (1926); *Liggett Co.* v. *Baldrige,* 278 U. S. 105 (1928).

With like disregard of its holding and intervening constitutional development, petitioners stress *United States* v. *Cruikshank* (1876). As has been noted, that case involved a criminal prosecution under the section of the enforcement law of 1870 also involved in *United States* v. *Hall, supra.* The case was decided on the narrow ground that the particular indictment was not sufficiently definite in its terms—significantly enough none of the dissenting justices

* So far as *United States* v. *Wheeler,* 254 U. S. 281 (1920), cited by petitioners, indicates any opposite view, it must be deemed qualified by the later decision in *Colgate* v. *Harvey, supra.*

in the *Slaughter House Cases* found it necessary to register a dissent in the *Cruikshank* case. We need not pause on the *Cruikshank* case at any length, because there as in the *Slaughter House Cases* the opinion merely reflected a narrow view of the substantive scope of the Fourteenth Amndment which, in the first place, in no way supports petitioners' attempted distinction between rights "secured" and rights "created", and, in the second place, is plainly not the law today. The opinion contains a *dictum* to the effect that the right of peaceable assembly* is a right inherent or fundamental, not attaching to National citizenship or originating in or created by any provision of the Constitution, and therefore a right *in no sense protected* by the Fourteenth Amendment. (Thus *United States* v. *Hall* was impliedly overruled,—but only temporarily, for the holding of the *Hall* case is today good law supported by authoritative decisions of this Court.) Having declared that the right of peaceable assembly was in no sense protected by the Fourteenth Amendment, the Court had no occasion to determine whether it was secured in the sense used in the enforcement law—*it simply was not covered as a matter of substantive interpretation of the Fourteenth Amendment.* It may be added that so far as the *Cruikshank* case also contains a *dictum* on the subject of the equal protection clause it merely reflects the view previously advanced in the *Slaughter House Cases* which is certainly no longer the law.

There is, then, no conceivable basis in the authorities upon which the petitioners principally rely for their conception that rights protected by the Fourteenth Amendment may be summarily categorized as, on the one hand, rights "secured" because originating in or created by other provisions of the Constitution and thereupon guaranteed by the Fourteenth Amendment (rights of National

* Always excepting the case of peaceable assembly to petition any National agency for a redress of grievances, which the Court acknowledges to be a right of National citizenship.

citizenship), and, on the other hand, rights not "secured" because not originating in or created by other provisions of the Constitution, but nonetheless guaranteed by the Fourteenth Amendment. The purported distinction rests, as we have seen, only on early cases declaring that rights other than those of National citizenship were *in no sense protected* by the Fourteenth Amendment and these cases are no longer good law. As the Fourteenth Amendment now protects and guarantees both kinds of rights (assuming that any distinction whatever can be sensibly made), it "secures" them; and by the same token they are covered by the Civil Rights Act. The Civil Rights Act keeps pace with the substantive expansion of the Fourteenth Amendment to include the fundamental civil rights. The whole question is adequately disposed of in the opinion of the Circuit Court of Appeals herein as follows (4 R. 123):

> *"Since the statutory provisions set out above were enacted originally to enforce recognition by the states of the civil rights secured by the Fourteenth Amendment and in view of the fact that the civil rights to which the Fourteenth Amendment affords protection are secured by it only in the sense of being protected or guaranteed against invasion by the states, we think that it is entirely clear that Section 24 (14) of the Judicial Code, uses the phrase 'secured by the Constitution' in that sense which is its plain and ordinary meaning, viz., to put beyond hazard of losing."*

We may dispose briefly of the other authorities claimed by petitioners to conflict with the view here expressed and adopted by the Circuit Court of Appeals. *Holt* v. *Indiana Manufacturing Co.*, 176 U. S. 68 (1900), was a suit to enjoin enforcement of a tax statute on the ordinary grounds—impairment of obligation of contract, due process and equal protection. No distinctive *civil* rights were involved and the Court properly stated, as to the sections of the Civil Rights Act there relied on, "it is

sufficient to say that they refer to civil rights only, and are inapplicable here" (p. 72). The distinction between the *Holt* case and the case at bar is that distinctive civil rights are present here beyond all question. On the same ground *Marcus Brown Holding Co.* v. *Pollak,* 272 Fed. 137 (D. N. Y. 1920), is distinguishable. That was a motion to dismiss on jurisdictional grounds a bill seeking to restrain a tenant from continued occupancy of leased premises after expiration of the lease, and to enjoin enforcement of a New York statute designed to prevent extortionate rents by depriving landlords of the right to evict tenants by summary proceedings and making it a defense to an action for rent to show that the amount demanded was unreasonable. Plainly the right involved was not distinctively civil, and jurisdictional amount had to be shown under Section 24 (1) of the Judicial Code. Of *Gobitis* v. *Minersville School District,* 21 F. Supp. 581, D. Pa. (1938), it is enough to say that the expression as to subdivision (14) is pure *dictum* unsupported by authority. That the case has no specific bearing herein is shown as clearly as may be by the fact that Judge MARIS, who decided it, concurred in the majority opinion of the Circuit Court of Appeals in the case at bar.

At some points in their brief, petitioners squint in the direction of arguing, as an original proposition, apart from their historical analysis already shown to be erroneous, that the word "secured" in its ordinary and normal signification means "created" as distinguished from "protected" or "guaranteed." The short answer to this contention is found in the very cases decided by this Court interpreting the Fourteenth Amendment to include the fundamental civil rights. In those cases this Court has used the words "secured," "guaranteed," and "protected" interchangeably. See *Gitlow* v. *New York, supra,*

p. 666 ("* * * freedom of speech and of the press which is *secured* by the Constitution * * *"); *Grosjean* v. *American Press Co.*, *Powell* v. *Alabama*, *Near* v. *Minnesota*, *supra*; *Stromberg* v. *California*, 283 U. S. 359 (1931). The language of Mr. Justice HUGHES in *Truax* v. *Raich*, *supra*, p. 41, may be taken as typical of the use of the word "secured" as meaning what it customarily means, namely, guarantee, protect, insure against hazard of loss, etc.:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to *secure*."

See also *State Board of Health* v. *Diamond Mills Paper Co.*, 63 N. J. Eq. 111, 113 (1902), where the court said:

> "Giving the word 'secure' the meaning of 'guard' or 'protect', which is one of its ordinary meanings, it seems to me that the title accurately expresses the object."

Standard dictionaries define the word "secure" in the same way. See, *e. g.*, Funk & Wagnalls, *Standard Dictionary* (1934 ed.):

> "To make secure, protect, or free from danger, risk or hazard; make safe; as, to *secure* a town by a wall.
>
> "To make sure against risk of loss, or to insure the payment, return or receipt of; make certain of having or receiving some good; assure; guarantee."

There is no basis, then, in its ordinary signification, for a limitation of the word "secure" to mean "grant", "create in the first instance", or the like.

Plainly the civil rights here in issue are secured by the Fourteenth Amendment (and therefore by the Civil Rights Act) in the simple sense that, whereas in the absence of the Amendment a State could impair those rights with im-

punity so far as the Federal Constitution was concerned, they are by the Amendment forbidden to do so. As the Circuit Court of Appeals aptly said, the statutes use the phrase "secured by the Constitution" "in that sense which is its plain and ordinary meaning, *viz., to put beyond hazard of losing*" (4 R. 123).

In interpreting the statutory language as just indicated, the Circuit Court of Appeals quoted and relied upon *Smith* v. *United States*, 157 Fed. 721 (C. C. A. 8th), *cert. den.*, 208 U. S. 618 (1908). The court dealt there with the question whether the right to be free from involuntary servitude was a right "secured" by the Constitution. It was argued there, as here, that the right was inherent and fundamental, and was not "secured" by the Thirteenth Amendment in the sense of having been granted by that Amendment or created by it in the first instance. The court held, in a closely reasoned opinion, that the word "secured" included the concept of additional protection or guaranty. Said the court (pp. 724-5):

> "* * * the statute protects a right 'secured' by the Constitution and laws; not one originating in, created, or granted by them. This discriminating use of words is significant, and in our opinion, conclusive against defendant's contention. The Constitution ordains that neither slavery nor involuntary servitude shall exist within the United States, etc. Nothing can more effectually secure the right of freedom from slavery or involuntary servitude than this peremptory and all comprehensive prohibition against their existence anywhere within the jurisdiction of the United States. * * * It [the statute] was enacted in view of that amendment and the right undertaken to be protected by it is undoubtedly a right secured by the amendment.
>
> "The cases cited by learned counsel in support of their view (*Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Waddell*, 112 U. S. 76; *Logan* v. *United States*, 144 U. S. 263; *In re Quarles & Butler*, 158 U. S. 532) relate generally to conspiracies

to injure or intimidate a citizen in the exercise of some conventional right actually created or conferred by the Constitution or by some law as distinguished from a natural right and therefore do not make against our conclusion in the case. A right which has been conferred by law is manifestly secured by that law. *Such concession, however, is no authority for the contention that a right secured by law must necessarily have been conferred by some law.*"

The foregoing shows that the civil rights here involved are "secured" within the meaning of the pertinent statutes, as rights protected or guaranteed, even if not "created". But even if, following petitioners' theory, we should rewrite the statutes and substitute the word "created" for the word "secured", there is no sound reason why the rights here in issue may not be deemed created by the Constitution.

First, the rights are created by the *Fourteenth Amendment* in the sense that the Amendment created a new set of sanctions to protect against their invasion. There may be such things as rights which exist apart from an effective means for their enforcement, but if there are such, they are irrelevant to the law; the law takes no notice of them. In realistic terms a right can only be defined in terms of what a party aggrieved by its violation can do about it.

Prior to the adoption of the Fourteenth Amendment (and its judicial interpretation to cover the field of civil rights) a person whose civil liberties had been abridged by a State might get redress provided the State constitution or laws covered the case, and not otherwise. This was the extent of the sanctions which he could invoke. Today, upon identical facts, he may get redress no matter what the State constitution or laws provide, by direct reference to the Federal Constitution. That Federal sanction is in every true sense a new right "created" in

the first instance by the Fourteenth Amendment, a part of the Constitution, and thus covered by the Civil Rights Act upon petitioners' own theory.

This conclusion seems especially clear in respect of rights flowing from the *equal protection clause*. The right not to be discriminated against by State law or State action was certainly a new one.

Second, the civil rights here in issue may also be said to have been created by a *provision of the Constitution other than the Fourteenth Amendment, i. e.*, the First Amendment (possibly also the Fourth). Certainly the rights created by the Bill of Rights were new rights freshly granted or created, since the National Government whose power they effectively limited, was a new entity. The fact that the Fourteenth Amendment, as judicially construed, affords additional protection to the same basic rights, does not militate against the fact that the First Amendment created them. In order to satisfy petitioners' definition of the word "secured" as meaning "created in the first instance" by the Constitution, it is presumably not necessary to find that the right involved was created by the Fourteenth Amendment itself; indeed, petitioners themselves insist that rights of National citizenship are not created by the Fourteenth Amendment but by other provisions of the Constitution—which proves that any part of the Constitution will serve as the source of creation. Judge Biggs presents this point below as follows (4 R. 124):

> "But if we were of the opinion that the words used in the statute 'secured by the Constitution' mean created in the first instance by the Constitution we would still be compelled to hold that these rights were secured by the Constitution since, as we have seen, they were secured in that sense to the people of this country by the First and Fourth Amendments which conferred these rights upon citizens of the Federal government and protected them against infringement by that government."

C. Jurisdiction existed under Section 24 (12) of the Judicial Code (conspiracy respecting civil rights).

Of special significance in this case, as has already been shown, is the District Court's express finding, confirmed by the Circuit Court of Appeals below, that the petitioners' unlawful activities, vigorously denounced by both of these courts, were performed in pursuance of a "deliberate policy" which petitioners had "adopted and enforced" and which they threatened to continue.

It was urged by respondents both in the District Court and in the Circuit Court of Appeals that jurisdiction existed to subject to injunctive process those who thus *conspired* to deprive others of their fundamental constitutional rights. While the District Court, in addition to finding other bases of jurisdiction, so ruled (Conclusion 1, 7), the Circuit Court of Appeals did not discuss this particular jurisdictional ground, as the other bases urged by the respondents were found to be entirely sufficient. It is submitted that an independent and sufficient ground of jurisdiction derives from the Federal statutes affording relief from *conspiracies* having as their purpose the deprivation of civil rights.

Section 47 of Title 8 of the United States Code, derived from the Civil Rights Act of 1871, provides in its third subdivision:

> "*Same* [conspiracy]; *to deprive citizen of rights or privileges.* If two or more persons in any State or Territory *conspire* or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * * in any case of con-

spiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his *person or property*, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

The conspiracy for which a cause of action is thereby created is denounced as criminal by Section 19 of the Criminal Code (18 U. S. C., Section 51), which reads as follows:

"*Conspiracy to injure persons in exercise of civil rights.* If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

It will thus be noted that a conspiracy aimed to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws" subjects the conspirators to a civil action under Section 47, above quoted, and if such persons in combination attempt to "injure * * * any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States" they thereby subject themselves to criminal responsibility under Section 51, above quoted.

To accord an effective means of enforcement of these substantive provisions, Congress in Section 24 of the Judicial Code excepted from the general requirements of jurisdictional amount suits concerning civil rights impaired by virtue of the type of conspiracy condemned by Section 47. This original jurisdiction in the Federal courts is granted by the twelfth subdivision of Section 24 of the Judicial Code:

> "*Suits concerning civil rights.* Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8."

This Court has assumed the existence of Federal jurisdiction to enjoin a conspiracy having for its purpose the deprivation of rights secured by the Constitution or laws of the United States. That the petitioners, individually and as public officials, acting in concert, premeditatedly and deliberately deprived the respondents of their basic civil rights, was found by both the District Court and the Circuit Court of Appeals. Authority for the existence of this jurisdiction in conspiracy cases appears in the several opinions in *Pennsylvania R. System* v. *Pennsylvania R. Co.*, 296 Fed. 220 (D. Pa. 1924), *aff'd*, 1 F. (2d) 171 (C. C. A. 3rd, 1924), *aff'd*, 267 U. S. 203 (1925). Although the complaint there was ultimately dismissed, the courts, including this Court, recognized Federal jurisdiction to grant equitable relief to persons injured by the continuance of conspiracies designed to deprive them of rights secured by Federal law. In that case a bill was filed by two railroad unions against a carrier alleging that the Labor Board created by the Transportation Act of 1920 had prescribed how the representatives of the railroad company and its employees, for the purpose of

settling a dispute as to working conditions, should be elected; that the railroad carrier had refused to comply with the Board's decision; and that the railroad officials had conspired to defeat the provisions of the Act and to deprive the employees of the rights with which the Act intended to invest them in their dealings with the railroad. The unions contended that this constituted a conspiracy in violation of Section 51, and that they were entitled to injunctive relief.

Had the acts of the railroad actually been in pursuance of a conspiracy to violate the Federal Transportation Act, the opinion of this Court and of the lower courts in that case, by clear implication, showed that the equitable relief prayed for would have been granted. In the District Court it had been urged that the railroad unions had an adequate remedy at law, but the court found otherwise and in addition found that the railroad's argument that no equities were disclosed growing out of the conspiracy charge was unsound.

The Circuit Court of Appeals pointed out that the railroad unions grounded their complaint upon what they described as their "civil and statutory rights," and averred a conspiracy to deprive them of these rights, and prayed that the injunctive remedy of the Federal court of equity—there being no adequate remedy at law—be invoked to restrain the railroads from continuing and completing their conspiracy (1 F. [2d], p. 176). The dismissal of the bill was affirmed, however, for as the court pointed out (1 F. [2d], p. 177):

> "The thing here charged against the Company was conduct which under the terms of the Transportation Act and in the light of the decision of the Supreme Court * * * was not unlawful either in purpose or in means employed to carry out the purpose. It follows that in their conspiracy charge the complainants are not aided by a statutory right."

This was so because, while the Act created a Labor Board, the sanctions of publication and public opinion were the only methods of forcing the railroad company to obey the Board's decision, so that in the absence of a *duty* on the part of the railroad to carry out the terms of such a decision, a combination to violate it could not be made the basis of a charge of unlawful conspiracy in violation of Section 51 against which a court of equity might grant relief by injunction." This Court said (267 U. S., p. 210):

> "The whole case for Federation No. 90 rests upon the contention that the conduct of the Company and its officers is a statutory offense in the nature of a conspiracy under the provisions of Sec. 19 of the Criminal Code, which provides that if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the laws of the United States, they shall be punished; and further that injunction will lie to restrain the means for promoting such conspiracy. Moreover, it is claimed that this is a conspiracy at common law, because it is a combination to accomplish an unlawful result by unlawful means, and actionable. Citing *Pettibone* v. *United States*, 148 U. S. 197, and *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 465. The whole issue, therefore, is whether the provisions of Title III in pointing out what Congress wished the parties to the dispute to do was intended by Congress to be a positive, obligatory law, creating an enforceable duty such that a combination by the Company and its officials to violate it is a conspiracy."

And again (p. 217):

> "We do not think Congress, while it would deprecate such action, intended to make it criminal or legally actionable. Therefore, the bill of complaint does not aver a conspiracy, and without that, equitable relief cannot be granted."

It appears that no diversity of citizenship existed in that case and no mention was made of jurisdictional amount. The suit was grounded upon an alleged conspiracy to deprive the unions of rights which they claimed under a Federal statute. In the instant case, a more flagrant type of conspiracy in the form of a combination of public officials to deprive the respondents of their rights under the *Federal Constitution and laws* is shown.

The theory behind the type of relief afforded in such cases is well recognized. When basic rights are repeatedly or continuously violated by concerted acts of public officials, the action for damages mentioned in subdivision (12) becomes inadequate and upon familiar principles equitable relief is granted. For instance, the Federal courts have granted relief against continuing injuries to avoid a multiplicity of suits at law. *Royal Baking Powder Co.* v. *Emerson*, 270 Fed. 429 (C. C. A. 8th, 1920), *cert. den.*, 260 U. S. 752 (1922); *Dearborn Pub. Co.* v. *Fitzgerald*, 271 Fed. 479 (N. D. Ohio, 1921); *Phoenix L. Ins. Co.* v. *Bailey*, 13 Wall. 616 (1871). Similarly, a Federal court of equity will intervene for the prevention of threatened injuries even though a remedy at law for monetary damages may be available. *Ex parte Young*, 209 U. S. 123 (1908); *American Steel & Wire Co.* v. *Davis*, 261 Fed. 800 (D. Ohio, 1919); *American Mercury Inc.* v. *Chase*, 13 F. (2d) 224 (D. Mass. 1926); *In re Beine*, 42 Fed. 545 (D. Kans. 1890). The evidence in this case discloses that a letter written by the Corporation Counsel of Jersey City on December 20, 1937 (Exh. P.-36), with full knowledge and approval of the petitioners, threatened arrest and prosecution of the respondents if they dared attempt to exercise in Jersey City those rights which both courts below found to be undeniably vested in respondents.

Petitioners have left the foregoing argument virtually unanswered. Subdivision (12) stands as a sound basis upon which the jurisdiction of the District Court was sustained.

POINT II

Subsidiary Objections Refuted

A. All of petitioners' actions here enjoined were performed in their capacities as municipal officers, and constituted State action within the meaning of the Fourteenth Amendment and applicable laws of the United States.

Under their Point III (1) petitioners state that the bill of complaint is bare of allegations that they acted as agents of the State. This is adequately answered by the following paragraphs of the bill of complaint: 3, 10, 11, 12, 14, 15, 18, 19 and 20 to 24 inclusive (R. 6, ff.).

The ordinances here involved were adopted and applied by petitioners under a general police power delegation to New Jersey municipalities by the Legislature of the State in the so-called "Home Rule Act", R. S. 40:48-1 and 40:67-1, and in R. S. 40:72-3 as to cities under the Commission form of government (R. 1031).

Judge Biggs describes the three types of acts enjoined by the decree as follows: "(1) acts pursuant to the express mandate of city ordinances found to be void on their face; (2) acts carried on under color of city ordinances discriminatively and therefore unconstitutionally applied; and (3) acts not under the authority of any ordinance or statute but committed under color of municipal office and as part of a deliberate municipal policy" (4 R. 126).

Judge Biggs then considers these three categories of wrongful action in the light of the pertinent decisions of this Court, and all are held to be State action, within the meaning of the constitutional limitations. In addition to the cases cited by Judge Biggs, there may be mentioned: *Ex parte Young*, 209 U. S. 123 (1908); *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20 (1907); *Norris* v. *Alabama*, 294 U. S. 587 (1935).

It is certainly novel doctrine that municipal officers who choose to be utterly lawless may by that very means prevent the assumption of jurisdiction by a Federal court under the Constitution and laws of the United States. The cases cited by petitioners to sustain that proposition are widely out of point.

B. There is jurisdiction to grant ancillary relief.

Under their Point III (m) petitioners consider various hypothetical situations depending upon this Court's rulings on jurisdiction under Section 24, subdivisions (1), (14), and (12), whch they contend would call for deletion of some of the relief granted. Our position is that Federal grounds are involved throughout, but even if some incidental *non-Federal* grounds are present, it is enough to say, first, that such grounds are integrated with or ancillary to Federal grounds and cannot, therefore, either oust the court of jurisdiction or prevent it from issuing a decree based partially upon non-Federal grounds; second, the controlling principle as enunciated by this Court is that once jurisdiction has properly attached on a substantive Federal ground, the court may grant *complete relief* by determining the questions in issue, including those arising under State law, and this *irrespective even of the disposition of the Federal question.* *Hurn* v. *Oursler,* 289 U. S. 238, 246 (1933); *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103 (1933); *Bohler* v. *Callaway,* 267 U. S. 479 (1925); *Chicago G. W. R. Co.* v. *Kendall,* 266 U. S. 94 (1924); *Greene* v. *Louisville and Inter R. Co.,* 244 U. S. 499 (1917).

C. The status of the respondent American Civil Liberties Union and the unincorporated labor unions was correctly adjudged below.

The Circuit Court of Appeals said (4 R. 126):

> "The [petitioners] contend that because one of the [respondents] is a corporation and others are unincorporated associations, they are not entitled to enjoy some of the civil rights which are the subject of the suit. All of the [respondents] referred to, however, are membership corporations or associations, and it clearly appears that the suit was brought by them for the benefit of their members. In our opinion, these [respondents] were proper parties and able to conduct the suit in representative capacities on behalf of the interests of their respective members. *International News Service* v. *Associated Press*, 248 U. S. 215."*

This is a complete answer to the petitioners' anomalous "artificial entity" argument. The court was unanimous on this point. It should be noted that there is only one corporate respondent, all the respondent labor unions being unincorporated associations. As to the latter, there can be no question of their right to assert deprivations of liberty since they are only the sum of their individual members. The only corporation, namely the American Civil Liberties Union, is not a business corporation but a membership corporation which, as the Circuit Court of Appeals held, similarly reflects the interests of its individual members. See also Kvos, *Inc.* v. *Associated Press*, 299 U. S. 269, 279 (1936). Furthermore, the rights of these groups here vindicated, while distinctively civil in nature, may be said to have a property aspect as well, since, as we

*In the *Associated Press* case the standing of the Associated Press, a non-profit membership corporation, to sue for injunctive relief was seriously challenged. This Court held that it could properly conduct the suit on behalf of and for the benefit of its individual members, and sustained its jurisdictional standing.

have shown, they cannot carry on their functions in the absence of freedom from personal restraint, freedom of speech, of the press, and the like.

However, even if the respondents other than the individual respondents are to be treated, contrary to fact, as ordinary corporations, and even if the rights involved are to be treated, contrary to fact, as having no property aspect, there is no substance in petitioners' contention that those circumstances debar the respondents of relief. It is not the rule that corporations may not complain of certain deprivations, at least, of their liberty. In *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), this Court held that a State may not deprive a corporation of freedom of the press by imposing a previous restraint upon it. Apparently, the same objection was raised in that case as here to the applicability of the Fourteenth Amendment to corporations. Mr. Justice SUTHERLAND, speaking for the unanimous Court, disposed of it in short order (p. 244):

> "But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses which are the clauses involved here."

The Justice specifically negatived the idea that this Court was primarily concerned with the property aspect of the question presented, pointing out that historically the vice inherent in special taxes on the press was not property deprivation (p. 247):

> "The aim of the struggle was not to relieve taxpayers from a burden but to establish and preserve the right of the English people to full information in respect of the doings and misdoings of their government."

A ruling that corporations are not entitled to the benefit of the liberty clause of the Fourteenth Amendment in so far as freedom of speech and press are concerned would be unthinkable. Three-quarters of the nearly 1,000

publishers of daily and Sunday newspapers in the United States are corporate entities (Editor and Publisher, Year Book for 1937). If the petitioners are correct in their contentions that a corporation may not complain that it has been deprived of liberty of the press, the States are entirely free to impose the worst possible kinds of previous restraint on all these corporations, provided only that such restraints do not involve property deprivations. Common sense and the clear language of the *Grosjean* case establish that this is not the constitutional rule.

The *Grosjean* case does not stand alone in holding that to some extent at least the liberty guaranty of the Fourteenth Amendment extends to corporations. See, *e. g., West Coast Hotel Company* v. *Parrish*, 300 U. S. 379 (1937). The entire opinion of the Chief Justice in the *Parrish* case is devoted to a consideration of whether the *"liberty"* of the defendant hotel company was impaired by the Washington Minimum Wage Law under attack (see opinion *passim*, and especially at p. 391).

In so far as the decree rests on a denial of equal protection as well as on a deprivation of liberty without due process of law, the jurisdictional standing of the A. C. L. U. and the respondent labor unions is doubly clear. For it is well settled that "corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons." Mr. Justice ROBERTS in *Liggett Co.* v. *Lee*, 288 U. S. 517, 536 (1933), citing *Southern Railroad Company* v. *Greene*, 216 U. S. 400; *Kentucky Finance Corp.* v. *Paramount Auto Exchange Corp.*, 262 U. S. 544; *Power Manufacturing Co.* v. *Saunders*, 274 U. S. 490; *Liggett Co.* v. *Baldridge*, 278 U. S. 105; and *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239.

The petitioners are likewise in error when they challenge in procedural terms the right of the various unincorporated respondents to sue. This phase of their

objection, of course, does not go to the American Civil Liberties Union which is clearly qualified to sue since it is a membership corporation. As to the respondent labor unions, there is no longer any doubt as to the standing of unincorporated associations as litigants in the Federal Courts. The question was settled by this Court in 1922. *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344. See also, *Hansel* v. *Purnell*, 1 F. (2d) 266, 269 (C. C. A. 6th, 1924), *cert. den.*, 266 U. S. 617 (1924), where the court said:

> "The Israelite House of David is a voluntary association. As such it is a distinct entity and may sue or be sued in the Federal Court."

The same is true of respondent labor unions here. See also, Rule 17 (b) of the Rules of Civil Procedure.

D. The decree is definite, practicable and enforcible.

With reference to the petitioners' objections to the decree on the ground of its enforcibility (see their Point II), the Circuit Court of Appeals said:

> "The appellants contend that it is not feasible for the court below to enforce the provisions of the decree entered by it and that therefore it should not have been made. *Giles* v. *Harris*, 189 U. S. 475. More specifically, the appellants' contention is that it would require the court below to exercise supervisory powers over the administration of government in Jersey City and to interfere with the orderly exercise of governmental duties. The appellants also contend that the court below has in effect constituted itself an ordinance making body and has involved itself directly in the administration of the public business of Jersey City.
>
> "We consider these objections to the decree to be without merit and consider it unnecessary to treat them in detail. We state that in our opinion the decree is enforcible and does not substitute the

> will of the court for that of the governing authority of Jersey City. Moreover, the decree is carefully worded. The police are left free to pursue the duties placed upon them by law, and in so far as they act within the scope of the law their activities are in no wise interfered with or hindered. The authorities of Jersey City, by the terms of the decree carefully drawn by the court below, are free to carry out their duties in respect to preserving the safety of the lives and property of the inhabitants of Jersey City within the structure of existing law" (4 R. 119-20).

Little need be added to the words of the court below. The objections to the form of the decree as to all issues except that of public meetings are plainly captious. The objections to the form of the decree as to public meetings are similarly a measure, not of the inadequacy of the provisions, but of petitioners' querulous disinclination to abide by them. The provisions are specific to a point where it is impossible to credit the petitioners' expressed inability to understand them. Jersey City is required to follow the pattern which prevails in the rest of the country: the petitioners are commanded to issue permits for public meetings provided application therefor is made three days in advance to the Director of Public Safety (thus assuring notice) unless there is conflict with recreational schedules (in the case of the parks) or with the easement of public passage (in the case of the streets). In addition they are ordered to furnish adequate police protection at meetings held, consistent with their ability to protect the safety of the inhabitants of the City. The decree on public meetings is so clear, simple and unambiguous that it reads like a primer for municipal officials.

If the judgment of the Circuit Court of Appeals is affirmed by this Court, it is submitted that Jersey City will find no difficulty in understanding the decree and living up to it.

CONCLUSION.

The decree under review should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 651.—October Term, 1938.

Frank Hague, Individually and as Mayor of Jersey City, et al., &c., Petitioners,
vs.
Committee for Industrial Organization, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 5, 1939.]

Mr. Justice Butler:

The judgment of the court in this case is that the decree is modified and as modified affirmed. Mr. Justice Frankfurter and Mr. Justice Douglas took no part in the consideration or decision of the case. Mr. Justice Roberts has an opinion in which Mr. Justice Black concurs, and Mr. Justice Stone an opinion in which Mr. Justice Reed concurs. The Chief Justice concurs in an opinion. Mr. Justice McReynolds and Mr. Justice Butler dissent for reasons stated in opinions by them respectively.

Mr. Justice Roberts delivered an opinion in which Mr. Justice Black concurred.

We granted certiorari as the case presents important questions in respect of the asserted privilege and immunity of citizens of the United States to advocate action pursuant to a federal statute, by distribution of printed matter and oral discussion in peaceable assembly; and the jurisdiction of federal courts of suits to restrain the abridgment of such privilege and immunity.

The respondents, individual citizens, unincorporated labor organizations composed of such citizens, and a membership corporation, brought suit in the United States District Court against the petitioners, the Mayor, the Director of Public Safety, and the Chief of Police of Jersey City, New Jersey, and the Board of Commissioners, the governing body of the city.

The bill alleges that acting under a city ordinance forbidding the leasing of any hall, without a permit from the Chief of Police, for a public meeting at which a speaker shall advocate obstruction of the Government of the United States or a state, or a change of government by other than lawful means, the petitioners, and their subordinates, have denied respondents the right to hold lawful meetings in Jersey City on the ground that they are Communists or Communist organizations; that pursuant to an unlawful plan, the petitioners have caused the eviction from the municipality of persons they considered undesirable because of their labor organization activities, and have announced that they will continue so to do. It further alleges that acting under an ordinance which forbids any person to "distribute or cause to be distributed or strewn about any street or public place any newspapers, paper, periodical, book, magazine, circular, card or pamphlet", the petitioners have discriminated against the respondents by prohibiting and interfering with distribution of leaflets and pamphlets by the respondents while permitting others to distribute similar printed matter; that pursuant to a plan and conspiracy to deny the respondents their Constitutional rights as citizens of the United States, the petitioners have caused respondents, and those acting with them, to be arrested for distributing printed matter in the streets, and have caused them, and their associates, to be carried beyond the limits of the city or to remote places therein, and have compelled them to board ferry boats destined for New York; have, with violence and force, interfered with the distribution of pamphlets discussing the rights of citizens under the National Labor Relations Act; have unlawfully searched persons coming into the city and seized printed matter in their possession; have arrested and prosecuted respondents, and those acting with them, for attempting to distribute such printed matter; and have threatened that if respondents attempt to hold public meetings in the city to discuss rights afforded by the National Labor Relations Act, they would be arrested; and unless restrained, the petitioners will continue in their unlawful conduct. The bill further alleges that respondents have repeatedly applied for permits to hold public meetings in the city for the stated purpose, as required by ordinance,[1] although they do not admit the

[1] "The Board of Commissioners of Jersey City Do Ordain:
"1. From and after the passage of this ordinance, no public parades or public assembly in or upon the public streets, highways, public parks or public

validity of the ordinance; but in execution of a common plan and purpose, the petitioners have consistently refused to issue any permits for meetings to be held by, or sponsored by, respondents, and have thus prevented the holding of such meetings; that the respondents did not, and do not, propose to advocate the destruction or overthrow of the government of the United States, or that of New Jersey, but that their sole purpose is to explain to workingmen the purposes of the National Labor Relations Act, the benefits to be derived from it, and the aid which the Committee for Industrial Organization would furnish workingmen to that end; and all the activities in which they seek to engage in Jersey City were, and are, to be performed peacefully, without intimidation, fraud, violence, or other unlawful methods.

The bill charges that the suit is to redress "the deprivation, under color of state law, statute and ordinance, of rights privileges and immunities secured by the Constitution of the United States and of rights secured by laws of the United States providing for equal rights of citizens of the United States" . . . . It charges that the petitioners' conduct "is in violation of their [respondents] rights and privileges as guaranteed by the Constitution of the United States." It alleges that the petitioners' conduct has been "in pursuance of an unlawful conspiracy . . . . to injure oppress threaten and intimidate citizens of the United States, including the individual plaintiffs herein, ... in the free exercise and enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States." . . . .

The bill charges that the ordinances are unconstitutional and void, or are being enforced against respondents in an unconstitutional and discriminatory way; and that the petitioners, as officials of the city, purporting to act under the ordinances, have deprived

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buildings of Jersey City shall take place or be conducted until a permit shall be obtained from the Director of Public Safety.

"2. The Director of Public Safety is hereby authorized and empowered to grant permits for parades and public assembly, upon application made to him at least three days prior to the proposed parade or public assembly.

"3. The Director of Public Safety is hereby authorized to refuse to issue said permit when, after investigation of all of the facts and circumstances pertinent to said application, he believes it to be proper to refuse the issuance thereof; provided, however, that said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage.

"4. Any person or persons violating any of the provisions of this ordinance shall upon conviction before a police magistrate of the City of Jersey City be punished by a fine not exceeding two hundred dollars or imprisonment in the Hudson County jail for a period not exceeding ninety days or both."

respondents of the privileges of free speech and peaceable assembly secured to them, as citizens of the United States, by the Fourteenth Amendment. It prays an injunction against continuance of petitioners' conduct.

The bill alleges that the cause is of a civil nature, arising under the Constitution and laws of the United States, wherein the amount in controversy exceeds $3,000, exclusive of interest and costs; and is a suit in equity to redress the deprivation, under color of state law, statute and ordinance, of rights, privileges and immunities secured by the Constitution of the United States, and of rights secured by the laws of the United States providing for equal rights of citizens of the United States and of all persons within the jurisdiction of the United States.

The answer denies generally, or qualifies, the allegations of the bill but does not deny that the individual respondents are citizens of the United States; denies that the amount in controversy "as to each plaintiff and against each defendant" exceeds $3,000, exclusive of interest and costs; and alleges that the supposed grounds of federal jurisdiction are frivolous, no facts being alleged sufficient to show that any substantial federal question is involved.

After trial upon the merits the District Court entered findings of fact and conclusions of law and a decree in favor of respondents.[2] In brief, the court found that the purposes of respondents, other than the American Civil Liberties Union, were the organization of unorganized workers into labor unions, causing such unions to exercise the normal and legal functions of labor organizations, such as collective bargaining with respect to the betterment of wages, hours of work and other terms and conditions of employment, and that these purposes were lawful; that the petitioners, acting in their official capacities, have adopted and enforced the deliberate policy of excluding and removing from Jersey City the agents of the respondents; have interfered with their right of passage upon the streets and access to the parks of the city; that these ends have been accomplished by force and violence despite the fact that the persons affected were acting in an orderly and peaceful manner; that exclusion, removal, personal restraint and interference, by force and violence, is accomplished without authority of law and without promptly bringing the persons taken into custody before a judicial officer for hearing.

[2] 25 F. Supp. 127.

The court further found that the petitioners, as officials, acting in reliance on the ordinance dealing with the subject, have adopted and enforced a deliberate policy of preventing the respondents, and their associates, from distributing circulars, leaflets, or handbills in Jersey City; that this has been done by policemen acting forcibly and violently; that the petitioners propose to continue to enforce the policy of such prevention; that the circulars and handbills, distribution of which has been prevented, were not offensive to public morals, and did not advocate unlawful conduct, but were germane to the purposes alleged in the bill, and that their distribution was being carried out in a way consistent with public order and without molestation of individuals or misuse or littering of the streets. Similar findings were made with respect to the prevention of the distribution of placards.

The findings are that the petitioners, as officials, have adopted and enforced a deliberate policy of forbidding the respondents and their associates from communicating their views respecting the National Labor Relations Act to the citizens of Jersey City by holding meetings or assemblies in the open air and at public places; that there is no competent proof that the proposed speakers have ever spoken at an assembly where a breach of the peace occurred or at which any utterances were made which violated the canons of proper discussion or gave occasion for disorder consequent upon what was said; that there is no competent proof that the parks of Jersey City are dedicated to any general purpose other than the recreation of the public and that there is competent proof that the municipal authorities have granted permits to various persons other than the respondents to speak at meetings in the streets of the city.

The court found that the rights of the respondents, and each of them, interfered with and frustrated by the petitioners, had a value, as to each respondent, in excess of $3,000, exclusive of interest and costs; that the petitioners' enforcement of their policy against the respondents caused the latter irreparable damage; that the respondents have been threatened with manifold and repeated persecution, and manifold and repeated invasions of their rights; and that they have done nothing to disentitle them to equitable relief.

The court concluded that it had jurisdiction under Sec. 24(1) (12) and (14) of the Judicial Code;[3] that the petitioners' official policy and acts were in violation of the Fourteenth Amendment, and

[3] 28 U. S. C. § 41(1), (12) and (14).

that the respondents had established a cause of action under the Constitution of the United States and under R. S. 1979, R. S. 1980 and R. S. 5508, as amended.[4]

The Circuit Court of Appeals concurred in the findings of fact; held the District Court had jurisdiction under Section 24 (1) and (14) of the Judicial Code; modified the decree in respect of one of its provisions, and, as modified, affirmed it.[5]

By their specifications of error, the petitioners limit the issues in this court to three matters. They contend that the court below erred in holding that the District Court had jurisdiction over all or some of the causes of action stated in the bill. Secondly, they assert that the court erred in holding that the street meeting ordinance is unconstitutional on its face, and that it has been unconstitutionally administered. Thirdly, they claim that the decree must be set aside because it exceeds the court's power and is impracticable of enforcement or of compliance.

First. Every question arising under the Constitution may, if properly raised in a state court, come ultimately to this court for decision. Until 1875,[6] save for the limited jurisdiction conferred by the Civil Rights Acts, *infra*, federal courts had no original jurisdiction of actions or suits merely because the matter in controversy arose under the Constitution or laws of the United States; and the jurisdiction then and since conferred upon United States courts has been narrowly limited.

Section 24 of the Judicial Code confers original jurisdiction upon District Courts of the United States. Subsection (1) gives jurisdiction of "suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000" and "arises under the Constitution or laws of the United States."

The wrongs of which respondents complain are tortious invasions of alleged civil rights by persons acting under color of state authority. It is true that if the various plaintiffs had brought actions at law for the redress of such wrongs the amount necessary to jurisdiction under Section 24 (1) would have been determined by the sum claimed in good faith.[7] But it does not follow that in a

[4] 8 U. S. C. §§ 43 and 47(3), 18 U. S. C. § 51.

[5] Hague *v.* Committee for Industrial Organization, 101 F. (2d) 774.

[6] See Act of March 3, 1875, c. 137, 18 Stat. 470.

[7] Wiley *v.* Sinkler, 179 U. S. 58; Swafford *v.* Templeton, 185 U. S. 487. Compare St. Paul Mercury Indemnity Co. *v.* Red Cab Co., 303 U. S. 283, 288.

suit to restrain threatened invasions of such rights a mere averment of the amount in controversy confers jurisdiction. In suits brought under subsection (1) a traverse of the allegation as to the amount in controversy, or a motion to dismiss based upon the absence of such amount, calls for substantial proof on the part of the plaintiff of facts justifying the conclusion that the suit involves the necessary sum.[8] The record here is bare of any showing of the value of the asserted rights to the respondents individually and the suggestion that, in total, they have the requisite value is unavailing, since the plaintiffs may not aggregate their interests in order to attain the amount necessary to give jurisdiction.[9] We conclude that the District Court lacked jurisdiction under Section 24(1).

Section 24(14) grants jurisdiction of suits "at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."[10]

The petitioners insist that the rights of which the respondents say they have been deprived are not within those described in subsection (14). The courts below have held that citizens of the United States possess such rights by virtue of their citizenship; that the Fourteenth Amendment secures these rights against invasion by a state, and authorizes legislation by Congress to enforce the Amendment.

Prior to the Civil War there was confusion and debate as to the relation between United States citizenship and state citizenship. Beyond dispute, citizenship of the United States, as such, existed. The Constitution, in various clauses, recognized it[11] but

[8] McNutt v. General Motors Acceptance Corp., 298 U. S. 178; compare KVOS, Inc. v. Associated Press, 299 U. S. 269.

[9] Wheless v. St. Louis, 180 U. S. 379; Pinel v. Pinel, 240 U. S. 594, 596; Scott v. Frazier, 253 U. S. 243.

[10] The section is derived from R. S. 563, Section 12, which, in turn, originated in Section 3 of the Civil Rights Act of April 9, 1866, 14 Stat. 27, as reenacted by Section 18 of the Civil Rights Act of May 31, 1870, 16 Stat. 144, and referred to in Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13.

[11] See Art. I, Sections 2 and 3; Art. II, Section 1.

nowhere defined it. Many thought state citizenship, and that only, created United States citizenship.[12]

After the adoption of the Thirteenth Amendment a bill, which became the first Civil Rights Act,[13] was introduced in the 39th Congress, the major purpose of which was to secure to the recently freed negroes all the civil rights secured to white men. This act declared that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, were citizens of the United States and should have the same rights in every state to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to enjoy the full and equal benefit of all laws and proceedings for the security of persons and property to the same extent as white citizens. None other than citizens of the United States were within the provisions of the Act. It provided that "any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected any inhabitant of any State . . . to the deprivation of any right secured or protected by this act" should be guilty of a misdemeanor. It also conferred on district courts jurisdiction of civil actions by persons deprived of rights secured to them by its terms.

By reason of doubts as to the power to enact the legislation, and because the policy thereby evidenced might be reversed by a subsequent Congress, there was introduced at the same session an additional amendment to the Constitution which became the Fourteenth.

The first sentence of the Amendment settled the old controversy as to citizenship by providing that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Thenceforward citizenship of the United States became primary and citizenship of a state secondary.[14]

The first section of the Amendment further provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;" . . .

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[12] See Scott *v.* Sandford, 19 How. 393.

[13] Act of April 9, 1866, c. 31, 14 Stat. 27.

[14] Selective Draft Cases, 245 U. S. 366, 389.

The second Civil Rights Act[15] was passed by the 41st Congress. Its purpose was to enforce the provisions of the Fourteenth Amendment, pursuant to the authority granted Congress by the fifth section of the amendment. By Section 18 it reenacted the Civil Rights Act of 1866.

A third Civil Rights Act, adopted April 20, 1871,[16] provided "That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the state to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; . . ." This with changes of the arrangement of clauses which were not intended to alter the scope of the provision became R. S. 1979, now Title 8, § 43 of the United States Code.

As has been said, prior to the adoption of the Fourteenth Amendment, there had been no constitutional definition of citizenship of the United States, or of the rights, privileges, and immunities secured thereby or springing therefrom. The phrase "privileges and immunities" was used in Article IV, Section 2 of the Constitution, which decrees that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as "natural rights"; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.[17]

While this description of the civil rights of the citizens of the States has been quoted with approval,[18] it has come to be the settled view that Article IV, Section 2, does not import that a citi-

[15] May 31, 1870, 16 Stat. 140. The act was amended by an Act of February 28, 1871, 16 Stat. 433.

[16] 17 Stat. 13, § 1.

[17] Corfield *v.* Coryell, 4 Was. C. C. 371, 6 Fed. Cas. No. 3230.

[18] The Slaughter-House Cases, 16 Wall. 36, 76; Maxwell *v.* Dow, 176 U. S. 581, 588, 591; Canadian Northern Ry. Co. *v.* Eggen, 252 U. S. 553, 560.

zen of one state carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the state first mentioned, but, on the contrary, that in any state every citizen of any other state is to have the same privileges and immunities which the citizens of that state enjoy. The section, in effect, prevents a state from discriminating against citizens of other states in favor of its own.[19]

The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgment[20] by Section 1 of the Fourteenth Amendment; and whether R. S. 1979 and Section 24(14) of the Judicial Code afford redress in a federal court *for such abridgment*. This is the narrow question presented by the record, and we confine our decision to it, without consideration of broader issues which the parties urge. The bill, the answer and the findings fully present the question. The bill alleges, and the findings sustain the allegation, that the respondents had no other purpose than to inform citizens of Jersey City by speech, and by the written word, respecting matters growing out of national legislation, the constitutionality of which this court has sustained.

Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgment,[21] it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects.

In the *Slaughter-House Cases* it was said, 16 Wall. 79: "The right to peaceably assemble and petition for redress of grievances,

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[19] Downham *v.* Alexandria, 10 Wall. 173; Chambers *v.* B. & O. R. Co., 207 U. S. 142; LaTourette *v.* McMaster, 248 U. S. 465; Chalker *v.* Birmingham & N. W. Ry. Co., 249 U. S. 522; Shaffer *v.* Carter, 252 U. S. 37; United States *v.* Wheeler, 254 U. S. 281; Douglas *v.* N. Y., N. H. & H. R. Co., 279 U. S. 377; Whitfield *v.* Ohio, 297 U. S. 431.

[20] As to what constitutes state action within the meaning of the amendment, see Virginia *v.* Rives, 100 U. S. 313; Ex parte Virginia, 100 U. S. 339, 347; Home Tel. Co. *v.* Los Angeles, 227 U. S. 278; Mooney *v.* Holohan, 294 U. S. 103, 112; Lovell *v.* Griffin, 303 U. S. 444, 450.

[21] The Slaughter-House Cases, 16 Wall. 36, 77; Minor *v.* Happersett, 21 Wall. 162; Ex parte Virginia, 100 U. S. 339; In re Kemmler, 136 U. S. 436, 448.

the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution.

In *United States* v. *Cruikshank*, 92 U. S. 542, 552-553, the court said:

"The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States."

No expression of a contrary view has ever been voiced by this court.

The National Labor Relations Act declares the policy of the United States to be to remove obstructions to commerce by encouraging collective bargaining, protecting full freedom of association and self-organization of workers, and, through their representatives, negotiating as to conditions of employment.

Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom. All of the respondents' proscribed activities had this single end and aim. The District Court had jurisdiction under Section 24(14).

Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for "citizens of the United States."[22] Only the individual respondents may, therefore, maintain this suit.

Second. What has been said demonstrates that, in the light of the facts found, privileges and immunities of the individual respondents as citizens of the United States, were infringed by the petitioners, by virtue of their official positions, under color of ordinances of Jersey City, unless, as petitioners contend, the city's ownership of

[22] Orient Insurance Co. v. Daggs, 172 U. S. 557; Holt v. Indiana Manufacturing Co., 176 U. S. 68; Western Turf Association v. Greenberg, 204 U. S. 359; Selover, Bates & Co. v. Walsh, 226 U. S. 112.

streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof, or unless, though the city holds the streets in trust for public use, the absolute denial of their use to the respondents is a valid exercise of the police power.

The findings of fact negative the latter assumption. In support of the former the petitioners rely upon *Davis* v. *Massachusetts*, 167 U. S. 43. There it appeared that, pursuant to enabling legislation, the city of Boston adopted an ordinance prohibiting anyone from speaking, discharging fire arms, selling goods, or maintaining any booth for public amusement on any of the public grounds of the city except under a permit from the Mayor. Davis spoke on Boston Common without a permit and without applying to the Mayor for one. He was charged with a violation of the ordinance and moved to quash the complaint, *inter alia*, on the ground that the ordinance abridged his privileges and immunities as a citizen of the United States and denied him due process of law because it was arbitrary and unreasonable. His contentions were overruled and he was convicted. The judgment was affirmed by the Supreme Court of Massachusetts and by this court.

The decision seems to be grounded on the holding of the State court that the Common "was absolutely under the control of the legislature", and that it was thus "conclusively determined there was no right in the plaintiff in error to use the common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe." The Court added that the Fourteenth Amendment did not destroy the power of the states to enact police regulations as to a subject within their control or enable citizens to use public property in defiance of the constitution and laws of the State.

The ordinance there in question apparently had a different purpose from that of the one here challenged, for it was not directed solely at the exercise of the right of speech and assembly, but was addressed as well to other activities, not in the nature of civil rights, which doubtless might be regulated or prohibited as respects their enjoyment in parks. In the instant case the ordinance deals only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and is not a general measure to promote the public convenience in the use of the streets or parks.

We have no occasion to determine whether, on the facts disclosed, the *Davis Case* was rightly decided, but we cannot agree that it rules the instant case. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

We think the court below was right in holding the ordinance quoted in Note 1 void upon its face.[23] It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent "riots, disturbances or disorderly assemblage." It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly "prevent" such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.

The bill recited that policemen, acting under petitioners' instructions, had searched various persons, including the respondents, and had seized innocent circulars and pamphlets without warrant or probable cause. It prayed injunctive relief against repetition of this conduct. The District Court made no findings of fact concerning such searches and seizures and granted no relief with respect to them. The Circuit Court of Appeals did not enlarge the terms of the decree but found that unreasonable searches and seizures had occurred and that the prohibitions of the Fourth Amendment had been taken over by the Fourteenth so as to protect citizens of the United States against such action.

The decree as affirmed by the court below does not restrain any searches or seizures. In each of its provisions addressed to inter-

[23] Lovell *v.* Griffin, *supra*. See the construction of the ordinance by the Supreme Court of New Jersey in Thomas *v.* Casey, 121 N. J. L. 185.

ference with liberty of the person, or to the conspiracy to deport, exclude, and interfere bodily with the respondents in pursuit of their peaceable activities, the decree contains a saving clause of which the following is typical: "except in so far as such personal restraint is in accordance with any right of search and seizure." In the light of this reservation we think there was no occasion for the Circuit Court of Appeals to discuss the question whether exemption from the searches and seizures proscribed by the Fourth Amendment is afforded by the privileges and immunities clause of the Fourteenth, and we have no occasion to consider or decide any such question.

Third. It remains to consider the objections to the decree. Section A deals with liberty of the person and prohibits the petitioners from excluding or removing the respondents or persons acting with them from Jersey City, exercising personal restraint over them without warrant or confining them without lawful arrest and production of them for prompt judicial hearing, saving lawful search and seizure; or interfering with their free access to the streets, parks, or public places of the city. The argument is that this section of the decree is so vague in its terms as to be impractical of enforcement or obedience. We agree with the court below that the objection is not well founded.

Section B deals with liberty of the mind. Paragraph 1 enjoins the petitioners from interfering with the right of the respondents, their agents and those acting with them, to communicate their views as individuals to others on the streets in an orderly and peaceable manner. It reserves to the petitioners full liberty to enforce law and order by lawful search and seizure or by arrest and production before a judicial officer. We think this paragraph unassailable.

Paragraphs 2 and 3 enjoin interference with the distribution of circulars, handbills and placards. The decree attempts to formulate the conditions under which respondents and their sympathizers may distribute such literature free of interference. The ordinance absolutely prohibiting such distribution is void under our decision in *Lovell* v. *Griffin, supra,* and petitioners so concede. We think the decree goes too far. All respondents are entitled to is a decree declaring the ordinance void and enjoining the petitioners from enforcing it.

Paragraph 4 has to do with public meetings. Although the court below held the ordinance void, the decree enjoins the petitioners as to the manner in which they shall administer it. There is an initial command that the petitioners shall not place "any previous restraint" upon the respondents in respect of holding meetings, provided they apply for a permit as required by the ordinance. This is followed by an enumeration of the conditions under which a permit may be granted or denied. We think this is wrong. As the ordinance is void, the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners. They are free to hold meetings without a permit and without regard to the terms of the void ordinance. The courts cannot rewrite the ordinance, as the decree, in effect, does.

The bill should be dismissed as to all save the individual plaintiffs, and Section B, paragraphs 2, 3 and 4 of the decree should be modified as indicated. In other respects the decree should be affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 651.—October Term, 1938.

Frank Hague, Individually and as Mayor of Jersey City, et al., &c., Petitioners,
vs.
Committee for Industrial Organization, Steel Workers Organizing Committee of the Committee for Industrial Organization, et al.
} On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 5, 1939.]

Mr. Justice Stone.

I do not doubt that the decree below, modified as has been proposed, is rightly affirmed, but I am unable to follow the path by which some of my brethren have attained that end, and I think the matter is of sufficient importance to merit discussion in some detail.

It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment. *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Fiske* v. *Kansas*, 274 U. S. 380; *Stromberg* v. *California*, 283 U. S. 359; *Near* v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Lovell* v. *Griffin*, 303 U. S. 444. It has never been held that either is a privilege or immunity peculiar to citizenship of the United States, to which alone the privileges and immunities clause refers, *Slaughter-House Cases*, 16 Wall. 36; *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Twining* v. *New Jersey*, 211 U. S. 78, 97; *Maxwell* v. *Bugbee*, 250 U. S. 525, 538; *Hamilton* v. *Regents*, 293 U. S. 245, 261, and neither can be brought within the protection of that clause without enlarging the category of privileges and immunities of United States citizenship as it has hitherto been defined.

As will presently appear, the right to maintain a suit in equity to restrain state officers, acting under a state law, from infringing the rights of freedom of speech and of assembly guaranteed by the due process clause, is given by Act of Congress to every person within the jurisdiction of the United States whether a citizen or not, and such a suit may be maintained in the district court without allegation or proof that the jurisdictional amount required by § 24 (1) of the Judicial Code is involved. Hence there is no occasion, for jurisdictional purposes or any other, to consider whether freedom of speech and of assembly are immunities secured by the privileges and immunities clause of the Fourteenth Amendment to citizens of the United States, or to revive the contention, rejected by this Court in the *Slaughter-House Cases*, *supra*, that the privileges and immunities of United States citizenship, protected by that clause, extend beyond those which arise or grow out of the relationship of United States citizens to the national government.[1]

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[1] The privilege or immunity asserted in the Slaughter-House cases was the freedom to pursue a common business or calling, alleged to have been infringed by a state monopoly statute. It should not be forgotten that the Court, in deciding the case, did not deny the contention of the dissenting justices that the asserted freedom was in fact infringed by the state law. It rested its decision rather on the ground that the immunity claimed was not one belonging to persons by virtue of their citizenship. "It is quite clear", the Court declared (p. 74), "that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend on different characteristics in the individual." And it held that the protection of the privileges and immunities clause did not extend to those "fundamental" rights attached to state citizenship which are peculiarly the creation and concern of state governments and which Mr. Justice Washington, in Corfield v. Coryell, 4 Wash. C. C. 371, 6 Fed. Cas. No. 3230, mistakenly thought to be guaranteed by Article IV, § 2 of the Constitution. The privileges and immunities of citizens of the United States, it was pointed out, are confined to that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws. Slaughter-House Cases, 16 Wall. 36, 79; see Twining v. New Jersey, 211 U. S. 78, 97, 98.

That limitation upon the operation of the privileges and immunities clause has not been relaxed by any later decisions of this Court. In re Kemmler, 136 U. S. 436, 448; McPherson v. Blacker, 146 U. S. 1, 38; Giozza v. Tiernan, 148 U. S. 657, 661; Duncan v. Missouri, 152 U. S. 377, 382. Upon that ground appeals to this Court to extend the clause beyond the limitation have uniformly been rejected, and even those basic privileges and immunities secured against federal infringement by the first eight amendments have uniformly been held not to be protected from state action by the privileges and immunities clause. Walker v. Sauvinet, 92 U. S. 90; Hurtado v. California, 110 U. S. 516; Presser v. Illinois, 116 U. S. 252; O'Neill v. Vermont, 144 U. S. 323; Maxwell v. Dow, 176 U. S. 581; West v. Louisiana, 194 U. S. 258; Twining v. New Jersey, *supra*; Palko v. Connecticut, 302 U. S. 319.

The reason for this narrow construction of the clause and the consistently exhibited reluctance of this Court to enlarge its scope has been well understood since the decision of the Slaughter-Houses Cases. If its restraint upon state

That such is the limited application of the privileges and immunities clause seems now to be conceded by my brethren. But it is said that the freedom of respondents with which the petitioners have interfered is the "freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it", and that these are privileges and immunities of citizens of the United States secured against state abridgment by the privileges and immunities clause of the Fourteenth Amendment. It has been said that the right of citizens to assemble for the purpose of petitioning Congress for the redress of grievances is a privilege of United States citizenship protected by the privileges and immunities clause. *United States* v. *Cruikshank*, 92 U. S. 542, 552-553. We may assume for present purposes, although the step is a long and by no means certain one, see *Maxwell* v. *Dow*, 176 U. S. 581; *Twining* v. *New Jersey*, *supra*, that the right to assemble to discuss the advantages of the National Labor Relations Act is likewise a privilege secured by the privileges and immunities clause to citizens of the United States, but not to others, while freedom to assemble for the purpose of discussing a similar state statute would not be within the privileges and immunities clause. But the difficulty with this assumption is, as the record and briefs show, that it is an afterthought first emerging in this case after it was submitted to us for decision, and like most afterthoughts in litigated matters it is without adequate support in the record.

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action were to be extended more than is needful to protect relationships between the citizen and the national government, and if it were to be deemed to extend to those fundamental rights of person and property attached to citizenship by the common law and enactments of the states when the Amendment was adopted, such as were described in Corfield v. Coryell, *supra*, it would enlarge Congressional and judicial control of state action and multiply restrictions upon it whose nature, though difficult to anticipate with precision, would be of sufficient gravity to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the Slaughter-House Cases, with the decision against enlargement.

Of the fifty or more cases which have been brought to this Court since the adoption of the Fourteenth Amendment in which state statutes have been assailed as violating the privileges and immunities clause, in only a single case was a statute held to infringe a privilege or immunity peculiar to citizenship of the United States. In that one, Colgate v. Harvey, 296 U. S. 404, it was thought necessary to support the decision by pointing to the specific reference in the Slaughter-House Cases, *supra*, 79, to the right to pass freely from state to state, sustained as a right of national citizenship in Crandall v. Nevada, 6 Wall. 35, before the adoption of the Amendment.

The cases will be found collected in Footnote 2 of the dissenting opinion in Colgate v. Harvey, 296 U. S. 404, 445. To these should be added Holden v. Hardy, 169 U. S. 366; Ferry v. Spokane P. & S. R. Co., 258 U. S. 314; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63; Whitfield v. Ohio, 297 U. S. 431; Breedlove v. Suttles, 302 U. S. 277; Palko v. Connecticut, 302 U. S. 319.

The respondents in their bill of complaint specifically named and quoted Article IV, § 2, now conceded to be inapplicable, and the due process and equal protection clauses of the Fourteenth Amendment as the provisions of the Constitution which secure to them the rights of free speech and assembly. They omitted the privileges and immunities clause of the Fourteenth Amendment from their quotation. They made no specific allegation that any of those whose freedom had been interfered with by petitioners was a citizen of the United States. The general allegation that the acts of petitioners complained of violate the rights of "citizens of the United States, including the individual plaintiffs here", and other allegations of like tenor, were denied by petitioners' answer. There is no finding by either court below that any of respondents or any of those whose freedom of speech and assembly has been infringed are citizens of the United States, and we are referred to no part of the evidence in which their citizenship is mentioned or from which it can be inferred.

Both courts below found, and the evidence supports the findings, that the purpose of respondents, other than the Civil Liberties Union, in holding meetings in Jersey City, was to organize labor unions in various industries in order to secure to workers the benefits of collective bargaining with respect to betterment of wages, hours of work and other terms and conditions of employment. Whether the proposed unions were to be organized in industries which might be subject to the National Labor Relations Act or to the jurisdiction of the National Labor Relations Board does not appear. Neither court below has made any finding that the meetings were called to discuss, or that they ever did in fact discuss, the National Labor Relations Act. The findings do not support the conclusion that the proposed meetings involved any such relationship between the national government and respondents or any of them, assuming they are citizens of the United States, as to show that the asserted right or privilege was that of a citi of the United States, and I cannot say that an adequate basis has been laid for supporting a theory—which respondents themselves evidently did not entertain—that any of their privileges as citizens of the United States, guaranteed by the Fourteenth Amendment, were abridged, as distinguished from the privileges guaranteed to all persons by the due process clause. True, the findings refer to the suppression by petitioners of exhibits, one of which turns out to be a handbill advising workers they have the legal right, under the

Wagner Act, to choose their own labor union to represent them in collective bargaining. But the injunction, which the Court now rightly sustains, is not restricted to the protection of the right, said to pertain to United States citizenship, to disseminate information about the Wagner Act. On the contrary it extends and applies in the broadest terms to interferences with respondents in holding any lawful meeting and disseminating any lawful information by circular, leaflet, handbill and placard. If, as my brethren think, respondents are entitled to maintain in this suit only the rights secured to them by the privileges and immunities clause of the Fourteenth Amendment—here the right to disseminate information about the National Labor Relations Act—it is plain that the decree is too broad. Instead of enjoining, as it does, interferences with all meetings for all purposes and the lawful dissemination of all information, it should have confined its restraint to interferences with the dissemination of information about the National Labor Relations Act, through meetings or otherwise. The court below rightly omitted any such limitation from the decree, evidently because, as it declared, petitioners' acts infringed the due process clause, which guarantees to all persons freedom of speech and of assembly for any lawful purpose.

No more grave and important issue can be brought to this Court than that of freedom of speech and assembly, which the due process clause guarantees to all persons regardless of their citizenship, but which the privileges and immunities clause secures only to citizens, and then only to the limited extent that their relationship to the national government is affected. I am unable to rest decision here on the assertion, which I think the record fails to support, that respondents must depend upon their limited privileges as citizens of the United States in order to sustain their cause, or upon so palpable an avoidance of the real issue in the case, which respondents have raised by their pleadings and sustained by their proof. That issue is whether the present proceeding can be maintained under § 24(14) of the Judicial Code as a suit for the protection of rights and privileges guaranteed by the due process clause. I think respondents' right to maintain it does not depend on their citizenship and cannot rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act. It is enough that peti-

tioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose.

If it be the part of wisdom to avoid unnecessary decision of constitutional questions, it would seem to be equally so to avoid the unnecessary creation of novel constitutional doctrine, inadequately supported by the record, in order to attain an end easily and certainly reached by following the beaten paths of constitutional decision.

The right to maintain the present suit is conferred upon the individual respondents by the due process clause and Acts of Congress, regardless of their citizenship and of the amount in controversy. Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, provided that "any person who, under color of any law, statute, ordinance . . . of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress". And it directed that such proceedings should be prosecuted in the several district or circuit courts of the United States. The right of action given by this section was later specifically limited to "any citizen of the United States or other person within the jurisdiction thereof", and was extended to include rights, privileges and immunities secured by the laws of the United States as well as by the Constitution. As thus modified the provision was continued as § 1979 of the Revised Statutes and now constitutes § 43 of Title 8 of the United States Code. It will be observed that the cause of action, given by the section in its original as well as its final form, extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment. It will also be observed that they are those rights secured to persons, whether citizens of the United States or not, to whom the Amendment in terms extends the benefit of the due process and equal protection clauses.

Following the decision of the *Slaughter-House Cases* and before the later expansion by judicial decision of the content of the due process and equal protection clauses, there was little scope for the operation of this statute under the Fourteenth Amendment. The observation of the Court in *United States* v. *Cruikshank*, 92 U. S. 542, 551, that the right of assembly was not secured against state action by the Constitution, must be attributed to the decision in the *Slaughter-House Cases* that only privileges and immunities peculiar to United States citizenship were secured by the privileges and immunities clause, and to the further fact that at that time it had not been decided that the right was one protected by the due process clause. The argument that the phrase in the statute "secured by the Constitution" refers to rights "created", rather than "protected" by it, is not persuasive. The preamble of the Constitution, proclaiming the establishment of the Constitution in order to "secure the Blessings of Liberty", uses the word "secure" in the sense of "protect" or "make certain". That the phrase was used in this sense in the statute now under consideration was recognized in *Carter* v. *Greenhow*, 114 U. S. 317, 322, where it was held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the "right secured to him by that clause of the Constitution" [the contract clause], to which he had "chosen not to resort". See, as to other rights protected by the Constitution and hence secured by it, brought within the provisions of R. S. § 5508, *Logan* v. *United States*, 144 U. S. 263; *In re Quarles and Butler*, 158 U. S. 532; *United States* v. *Mosley*, 238 U. S. 383.

Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by § 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights. As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. *Northwestern Life Insurance Co.* v. *Riggs*, 203 U. S. 243, 255; *Western Turf Ass'n* v. *Greenberg*, 204 U. S. 359, 363.

The question remains whether there was jurisdiction in the district court to entertain the suit although the matter in controversy cannot be shown to exceed $3,000 in value because the asserted

rights, freedom of speech and freedom of assembly, are of such a nature as not to be susceptible of valuation in money. The question is the same whether the right or privilege asserted is secured by the privileges and immunities clause or any other. When the Civil Rights Act of 1871 directed that suits for violation of § 1 of that Act should be prosecuted in the district and circuit courts, the only requirement of a jurisdictional amount in suits brought in the federal courts was that imposed by § 11 of the Judiciary Act of 1789, which conferred jurisdiction on the circuit courts of suits where "the matter in dispute" exceeded $500 and the United States was a plaintiff, or an alien was a party, or the suit was between citizens of different states; and it was then plain that the requirement of a jurisdictional amount did not extend to the causes of action authorized by the Civil Rights Act of 1871. By the Act of March 3, 1875, c. 137, 18 Stat. 470, the jurisdiction of the circuit courts was extended to suits at common law or in equity "arising under the Constitution or laws of the United States" in which the matter in dispute exceeded $500. By the Act of March 3, 1911, c. 231, 36 Stat. 1087, the circuit courts were abolished and their jurisdiction was transferred to the district courts, and by successive enactments the jurisdictional amount applicable to certain classes of suits was raised to $3,000. The provisions applicable to such suits, thus modified, appear as § 24(1) of the Judicial Code, 28 U. S. C. § 41(1).

Meanwhile, the provisions conferring jurisdiction on district and circuit courts over suits brought under § 1 of the Civil Rights Act of 1871 were continued as R. S. §§ 563 and 629, and now appear as § 24(14) of the Judicial Code, 28 U. S. C. § 41(14). The Act of March 3, 1911, 36 Stat. 1087, 1091, amended § 24(1) of the Judicial Code so as to direct that "The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section".[2] Thus, since 1875, the jurisdictional acts have contained two parallel provisions, one conferring jurisdiction on the federal courts, district or circuit, to entertain suits "arising under the Constitution or laws of the United States" in which the amount in

[2] This provision made no change in existing law but was inserted for the purpose of removing all doubt upon the point. See H. R. Rep. No. 783, Part 1, 61st Cong., 2d Sess., p. 15; Sen. Rep. No. 388, Part 1, 61st Cong., 2d Sess. p. 11. Cf. Miller-Magee Co. *v.* Carpenter, 34 Fed. 435; Ames *v.* Hager, 36 Fed. 129.

controversy exceeds a specified value; the other, now § 24(14) of the Judicial Code, conferring jurisdiction on those courts of suits authorized by the Civil Rights Act of 1871, regardless of the amount in controversy.

Since all of the suits thus authorized are suits arising under a statute of the United States to redress deprivation of rights, privileges and immunities secured by the Constitution, all are literally suits "arising under the Constitution or laws of the United States". But it does not follow that in every such suit the plaintiff is required by § 24(1) of the Judicial Code to allege and prove that the constitutional immunity which he seeks to vindicate has a value in excess of $3,000. There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation, and in many instances, like the present, no suit in equity could be maintained for their protection if proof of the jurisdictional amount were prerequisite. We can hardly suppose that Congress, having in the broad terms of the Civil Rights Act of 1871 vested in all persons within the jurisdiction of the United States a right of action in equity for the deprivation of constitutional immunities, cognizable only in the federal courts, intended by the Act of 1875 to destroy those rights of action by withholding from the courts of the United States jurisdiction to entertain them.

That such was not the purpose of the Act of 1875 in extending the jurisdiction of federal courts to causes of action arising under the Constitution or laws of the United States involving a specified jurisdictional amount, is evident from the continuance upon the statute books of § 24(14) side by side with § 24(1) of the Judicial Code, as amended by the Act of 1875. Since the two provisions stand and must be read together, it is obvious that neither is to be interpreted as abolishing the other, especially when it is remembered that the 1911 amendment of § 24(1) provided that the requirement of a jurisdictional amount should not be construed to apply to cases mentioned in § 24(14). This must be taken as legislative recognition that there are suits authorized by § 1 of the Act of 1871 which could be brought under § 24(14) after, as well as before, the amendment of 1875 without compliance with any requirement of jurisdictional amount, and that these at least must be deemed to include suits in which the subject matter is one incapable of valuation. Otherwise we should be forced to reach

the absurd conclusion that § 24(14) is meaningless and that a large proportion of the suits authorized by the Civil Rights Act cannot be maintained in any court, although jurisdiction of them, with no requirement of jurisdictional amount, was carefully preserved by § 24(14) of the Judicial Code and by the 1911 amendment of § 24(1). By treating § 24(14) as conferring federal jurisdiction of suits brought under the Act of 1871 in which the right asserted is inherently incapable of pecuniary valuation, we harmonize the two parallel provisions of the Judicial Code, construe neither as superfluous, and give to each a scope in conformity with its history and manifest purpose.

The practical construction which has been given by this Court to the two jurisdictional provisions establishes that the jurisdiction conferred by § 24(14) has been preserved to the extent indicated. In *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68, suit was brought to restrain alleged unconstitutional taxation of patent rights. The Court held that the suit was one arising under the Constitution or laws of the United States within the meaning of § 24(1) of the Judicial Code and that the United States Circuit Court in which the suit had been begun was without jurisdiction because the challenged tax was less than the jurisdictional amount. The Court remarked that the present § 24(14) applied only to suits alleging deprivation of "civil rights". On the other hand, in *Truax* v. *Raich*, 239 U. S. 33, aff'g 219 Fed. 273, this Court sustained the jurisdiction of a district court to entertain the suit of an alien to restrain enforcement of a state statute alleged to be an infringement of the equal protection clause of the Fourteenth Amendment because it discriminated against aliens in their right to seek and retain employment. The jurisdiction of a district court was similarly sustained in *Crane* v. *Johnson*, 242 U. S. 339, on the authority of *Truax* v. *Raich*, *supra*. The suit was brought in a district court to restrain enforcement of a state statute alleged to deny equal protection in suppressing the freedom to pursue a particular trade or calling. For the purposes of the present case it is important to note that the constitutional right or immunity alleged in these two cases was one of personal freedom, invoked in the *Raich* case by one not a citizen of the United States. In both cases the right asserted arose under the equal protection, not the privileges and immunities clause; in both the gist of the cause of action was not damage or injury to property, but unconstitutional infringement of a right

of personal liberty not susceptible of valuation in money. The jurisdiction was sustained despite the omission of any allegation or proof of jurisdictional amount, pointedly brought to the attention of this Court.

The conclusion seems inescapable that the right conferred by the Act of 1871 to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution, has been preserved, and that whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under § 24(14) of the Judicial Code to entertain it without proof that the amount in controversy exceeds $3,000. As the right is secured to "any person" by the due process clause, and as the statute permits the suit to be brought by "any person" as well as by a citizen, it is certain that resort to the privileges and immunities clause would not support the decree which we now sustain and would involve constitutional experimentation as gratuitous as it is unwarranted. We cannot be sure that its consequences would not be unfortunate.

Mr. Chief Justice HUGHES, concurring:

With respect to the merits I agree with the opinion of Mr. Justice ROBERTS and in the affirmance of the judgment as modified. With respect to the point as to jurisdiction I agree with what is said in the opinion of Mr. Justice ROBERTS as to the right to discuss the National Labor Relations Act being a privilege of a citizen of the United States, but I am not satisfied that the record adequately supports the resting of jurisdiction upon that ground. As to that matter, I concur in the opinion of Mr. Justice STONE.

Mr. Justice MCREYNOLDS.

I am of opinion that the decree of the Circuit Court of Appeals should be reversed and the cause remanded to the District Court with instructions to dismiss the bill. In the circumstances disclosed, I conclude that the District Court should have refused to interfere

by injunction with the essential rights of the municipality to control its own parks and streets. Wise management of such intimate local affairs, generally at least, is beyond the competency of federal courts, and essays in that direction should be avoided.

There was ample opportunity for respondents to assert their claims through an orderly proceeding in courts of the state empowered authoritatively to interpret her laws with final review here in respect of federal questions.

Mr. Justice BUTLER.

I am of opinion that the challenged ordinance is not void on its face; that in principle it does not differ from the Boston ordinance, as applied and upheld by this Court, speaking through Mr. Justice White, in *Davis* v. *Massachusetts*, 167 U. S. 43, affirming the Supreme Judicial Court of Massachusetts, speaking through Mr. Justice Holmes, in *Commonwealth* v. *Davis*, 162 Mass. 510, and that the decree of the Circuit Court of Appeals should be reversed.